

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

VIRGINIA MILANES, *et al.*,

Plaintiffs,

V.

MICHAEL CHERTOFF, *et al.*,

Defendants.

ECF Case

08 Civ. 2354 (LMM) (KNF)

## DECLARATION OF KIRTI VAIDYA REDDY

I, Kirti Vaidya Reddy, declare pursuant to the provisions of 28 U.S.C. § 1746 as follows:

1. I am an Assistant United States Attorney representing the defendants in this matter. I submit this declaration in further support of defendants' motion to dismiss the complaint in part and remand in part, or in the alternative for summary judgment, and to put certain documents before the Court.

2. Attached as Exhibit A is the transcript of the deposition, dated July 1, 2008, of Michael Aytes, Acting Deputy Director of United States Citizenship and Immigration Services (“USCIS”).

3. Attached as Exhibit B is the transcript of the deposition, dated June 26, 2008, of Michael Cannon, Section Chief of the National Name Check Program Section of the Federal Bureau of Investigation (“FBI”).

4. Attached as Exhibit C are excerpts of the transcript of the deposition, dated July 2, 2008, of Gregory Smith, Associate Director of the National Security and Records Verification Directorate of USCIS.

5. Attached as Exhibit D are excerpts is the transcript of the deposition, dated June 26, 2008, of Prakash Khatri, a former USCIS ombudsman.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
July 18, 2008

/s/ Kirti Vaidya Reddy  
KIRTI VAIDYA REDDY  
Assistant United States Attorney  
Tel. (212) 637-2751  
Fax (212) 637-2687

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x  
:  
VIRGINIA MILANES, et al., :  
:  
Plaintiffs, :  
: Case No.  
v. : 08 Civ. 2354 (LMM)  
:  
MICHAEL CHERTOFF, et al., :  
:  
Defendants. :  
:  
- - - - - x

Oral 30(b)(6) Deposition of  
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES

By and Through Its Representative

MICHAEL L. AYLES

Washington, DC

Tuesday, July 1, 2008

9:39 a.m.

Job No.: 25501383

Pages 1 through 201

Reported by: Rebecca L. Stonerock, RPR

Page 2

1 Oral 30(b)(6) Deposition of  
 UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES  
 2 By and Through its Representative  
 MICHAEL L. AYTES  
 3  
 4  
 5 Held at the offices of:  
 6 WEIL, GOTSHAL & MANGES  
 7 1300 Eye Street Northwest  
 8 Suite 900  
 9 Washington, DC 20005  
 10 (202) 682-7000  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19 Taken pursuant to Notice, before Rebecca L.  
 20 Stonerock, Registered Professional Reporter and Notary  
 21 Public of the District of Columbia.  
 22

Page 3

1 A P P E A R A N C E S  
 2  
 3 ON BEHALF OF PLAINTIFFS:  
 4 MALICK W. GHACHEM, ESQUIRE  
 5 Weil, Gotshal & Manges  
 6 100 Federal Street Northwest  
 7 Boston, Massachusetts 02110  
 8 (617) 772-8806  
 9 and  
 10 ROBIN COOK, ESQUIRE  
 11 Weil, Gotshal & Manges  
 12 767 Fifth Avenue  
 13 New York, New York 10153  
 14 (202) 310-8000  
 15 and  
 16 JASON PARKIN, ESQUIRE  
 17 New York Legal Assistance Group  
 18 450 West 33rd Street, 11th Floor  
 19 New York, New York 10001  
 20 (212) 613-5000  
 21  
 22

Page 4

1 APPEARANCES (Continued):  
 2  
 3 ON BEHALF OF DEFENDANTS:  
 4 TOMOKO ONOZAWA, ESQUIRE  
 5 KIRTI VAIDYA REDDY, ESQUIRE  
 6 US Department of Justice  
 7 US Attorney's Office  
 8 Southern District of New York  
 9 86 Chambers Street, Third Floor  
 10 New York, New York 10007  
 11 Telephone: (212) 637-2721  
 12 and  
 13 SHARVARI DALAL-DHEINI, ESQUIRE  
 14 US Citizenship and Immigration Services  
 15 Washington, DC  
 16 Telephone: (202) 272-1414  
 17  
 18 ALSO PRESENT:  
 19 Caroline Aiello  
 20  
 21  
 22

Page 5

1 C O N T E N T S  
 2 EXAMINATION OF MICHAEL L. AYTES PAGE  
 3 By Mr. Ghachem 8  
 4 By Ms. Onozawa 192  
 5 By Mr. Ghachem 195  
 6  
 7  
 8 E X H I B I T S  
 9 (Attached to Transcript)  
 10 AYTES DEPOSITION EXHIBITS PAGE  
 11 Exhibit 1 Web page screen shot 27  
 12 Exhibit 2 12-13-02 Memo, Records Management  
 13 to Mueller, Bates CIS 001149 - 153 38  
 14 Exhibit 3 11-13-02 Memo, Williams  
 15 to Distribution List,  
 16 Bates CIS 002555 - 557 47  
 17 Exhibit 4 2-4-08 Memo, Aytes to Field  
 18 Leadership, Bates CIS 006284 - 285 65  
 19 Exhibit 5 8-2-06 USCIS FBI Name Check  
 20 Comparative Analysis,  
 21 Bates CIS 004401 - 413 96  
 22

<p style="text-align: right;">Page 6</p> <p>1 EXHIBITS (Continued):</p> <p>2 Exhibit 6 April 2001 DOJ G-325 Name Check</p> <p>3 Business Case Analysis Feasibility</p> <p>4 Study, Bates CIS 000987 - 1022 107</p> <p>5 Exhibit 7 12-8-98 PricewaterhouseCoopers,</p> <p>6 A Blueprint for the New</p> <p>7 Naturalization Process re G-325 Name</p> <p>8 Check Evaluation and Recommendation,</p> <p>9 Bates CIS 000119 - 127 112</p> <p>10 Exhibit 8 4-25-06 Memorandum, Aytes to Regional</p> <p>11 Directors, Bates CIS 004274 - 275 120</p> <p>12 Exhibit 9 FY 08/09 Production Plan,</p> <p>13 Domestic Operations</p> <p>14 Bates CIS Neufeld 0045 - 048 143</p> <p>15 Exhibit 10 Chapter from 2000 DOJ OIG report on</p> <p>16 CUSA, Bates CIS 000585 - 771 146</p> <p>17 Exhibit 11 Westlaw 8 CFR 335.2 158</p> <p>18 Exhibit 12 10-18-02 INS, ISD Interagency Border</p> <p>19 Inspection System Issues Paper,</p> <p>20 Bates YAKUB 005460 - 470 170</p> <p>21 Exhibit 13 4-14-08 E-mail, LaGonterie to Smith,</p> <p>22 Bates CIS Smith.e 00002 - 004 172</p>	<p style="text-align: right;">Page 8</p> <p>1 P R O C E E D I N G S</p> <p>2 MICHAEL L. AYTES</p> <p>3 having been duly sworn, testified as follows:</p> <p>4 EXAMINATION OF MICHAEL L. AYTES</p> <p>5 BY MR. GHACHEM:</p> <p>6 Q Good morning, Mr. Aytes. My name's Malick</p> <p>7 Ghachem. I'm the attorney for the plaintiffs in this</p> <p>8 case and I thank you for making yourself available to</p> <p>9 answer our questions today.</p> <p>10 MR. GHACHEM: Tomoko, should we agree on</p> <p>11 stipulations as an initial matter, that we reserve</p> <p>12 our objections except as to form until, I guess,</p> <p>13 the PI hearing in this case and then the trial if</p> <p>14 there's a trial beyond that?</p> <p>15 MS. ONOZAWA: Yes.</p> <p>16 BY MR. GHACHEM:</p> <p>17 Q Okay. Mr. Aytes, if you need to take a</p> <p>18 break at any point in this deposition, you know,</p> <p>19 indicate that to me.</p> <p>20 If my questions are unclear to you, please</p> <p>21 let me know. If you don't do so, I'll assume that you</p> <p>22 understand my question?</p>
<p style="text-align: right;">Page 7</p> <p>1 EXHIBITS (Continued):</p> <p>2 Exhibit 14 "USCIS and the FBI Name Check,"</p> <p>3 Bates CIS Smith 002-003 183</p> <p>4 - - -</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p style="text-align: right;">Page 9</p> <p>1 Have you had any prior deposition</p> <p>2 experience? Have you been deposed before?</p> <p>3 A Yes, I have.</p> <p>4 Q How many times?</p> <p>5 A Probably three or four.</p> <p>6 Q Are they in the last two or three years?</p> <p>7 A At least one was, yes.</p> <p>8 Q What was that case?</p> <p>9 A What was it? The -- Kaplan, I believe, was</p> <p>10 the name of it, social security citizenship case.</p> <p>11 Q What was the case about?</p> <p>12 A It had to do with naturalization processing</p> <p>13 and loss of supplemental social security benefits.</p> <p>14 Q Okay. And the other depositions that you</p> <p>15 have given, were they also related to your work for</p> <p>16 USCIS?</p> <p>17 A Yes, they were.</p> <p>18 Q All of them?</p> <p>19 A (Nodding head up and down.)</p> <p>20 Q Okay. Did any of those other cases have to</p> <p>21 do with naturalization delay claims?</p> <p>22 A Not that I recall.</p>

Page 10

1 Q So only the Kaplan case involved the  
2 naturalization delay issue?  
3 A I believe so.  
4 Q Okay.  
5 A These things run together, so forgive me  
6 if --  
7 Q Could you just give me a general sense of  
8 what some of the other matters may have involved?  
9 A There was some litigation relating to  
10 adjustment processing a couple of years ago. There  
11 was some litigation relating to employment-based case  
12 processing. That was probably three or four years  
13 ago.  
14 Q All right. Mr. Aytes, you understand that  
15 you're appearing at this deposition as a 30(b)(6)  
16 witness? That means that you are representing your  
17 agency, USCIS, and speaking on behalf of the agency.  
18 A I do.  
19 Q Do you understand what that means?  
20 A Yes, I do.  
21 Q And you also understand that I may be  
22 asking you certain questions about your individual

Page 11

1 experience as an official at USCIS including certain  
2 documents that you may have authored, and I'll be  
3 asking you about your personal experience in that  
4 sense insofar as it relates to your official duties?  
5 Do you understand that as well?  
6 A I understand that.  
7 Q Okay. Mr. Aytes, did you prepare for this  
8 deposition?  
9 A We talked yesterday afternoon --  
10 Q Okay.  
11 A -- for a short time.  
12 Q Just that one occasion?  
13 A Yes.  
14 Q Did you review any documents in preparation  
15 for this deposition?  
16 A No.  
17 Q Okay. So you said you spoke with -- with  
18 Tomoko and no other attorneys on your team?  
19 A There were three, I guess, there yesterday  
20 afternoon.  
21 MS. ONOZAWA: Ms. Dalal-Dheini and my  
22 colleague Kirti Reddy were also present.

Page 12

1 MR. GHACHEM: Were also present, okay.  
2 MS. ONOZAWA: K-I-R-T-I R-E-D-D-Y.  
3 MR. GHACHEM: And Ms. Dheini is -- what is  
4 her position?  
5 MS. DALAL-DHEINI: CIS counsel.  
6 Q All right. Mr. Aytes, I'm going to go  
7 through the topics that we have requested testimony on  
8 from USCIS and ask if you have prepared for those  
9 topics and are prepared to speak today about them.  
10 The first topic that we have listed in our  
11 30(b)(6) Notice and that your lawyers have designated  
12 you as the witness as is the following: How USCIS  
13 monitors the numbers of pending naturalization  
14 applications, the length of processing time of  
15 naturalization applications and/or delays in the  
16 processing of naturalization applications. Are you  
17 prepared to testify about that topic?  
18 A Yes, I am.  
19 Q Second topic that we have requested  
20 testimony on and that you were designated for is the  
21 following: Since the year 2000, the causes of delays  
22 and/or backlogs in the processing of naturalization

Page 13

1 applications at USCIS, the harms that those delays  
2 have caused, and any remedial efforts that USCIS has  
3 engaged in to remedy those delays or backlogs. Are  
4 you prepared to testify about that topic?  
5 A I can certainly testify about the causes  
6 and the actions that we take -- or that we took, not  
7 specifically with regards to perceived harm on  
8 individuals.  
9 Q Okay.  
10 MS. ONOZAWA: I would also interject and  
11 state that to the extent any of these topics seek  
12 materials protected by the deliberative process  
13 privilege I would direct Mr. Aytes not to answer  
14 those questions.  
15 Q Okay. When I say "USCIS," Mr. Aytes, will  
16 you understand that I mean USCIS from the time of its  
17 existence in late 2002 onwards as well as INS -- the  
18 predecessor INS agency, or would you like me to  
19 specify INS and USCIS every time I refer to your  
20 agency?  
21 A Unless you need to differentiate between  
22 the two at some point, we can use USCIS as both

<p style="text-align: right;">Page 14</p> <p>1 agencies over time.</p> <p>2 Q Great. The next topic that I'll be asking</p> <p>3 you about, Mr. Aytes, is the follow: Staffing and/or</p> <p>4 resource requests within USCIS and/or decisions</p> <p>5 related to the processing of naturalization</p> <p>6 applications. Are you ready to testify about that</p> <p>7 topic?</p> <p>8 A Yes, I am.</p> <p>9 Q The next topic is instructions or</p> <p>10 directives given by USCIS to the FBI to review and</p> <p>11 accomplish the name checks of naturalization</p> <p>12 applicants and/or any changes in those instructions by</p> <p>13 USCIS to the FBI since engaging in the Memorandum of</p> <p>14 Understand in 1985. Are you prepared to testify about</p> <p>15 that topic?</p> <p>16 A Not all the way back to 1985, but --</p> <p>17 MS. ONOZAWA: I would also interject and</p> <p>18 state that --</p> <p>19 MR. GHACHEM: There is a time limit, yes.</p> <p>20 MS. ONOZAWA: 2005 to 2007.</p> <p>21 MR. GHACHEM: Thanks.</p> <p>22 Q There is a time limitation on this. It's</p>	<p style="text-align: right;">Page 16</p> <p>1 plans or proposals to reduce the backlog in</p> <p>2 naturalization applications prior to the most recent</p> <p>3 April 2008 joint FBI/CIS plan to reduce the backlogs?</p> <p>4 MS. ONOZAWA: Just let me interject and</p> <p>5 state that we've objected to any plans or</p> <p>6 proposals that have not been implemented because</p> <p>7 they are covered on the deliberative process</p> <p>8 privilege.</p> <p>9 MR. GHACHEM: Okay.</p> <p>10 A I have to ask a clarification because you</p> <p>11 connected it with the FBI. Are you talking about the</p> <p>12 name check backlog or are you talking about the case</p> <p>13 processing in general?</p> <p>14 Q I'm talking about any backlogs or delays</p> <p>15 having to do with CIS's processing of naturalization</p> <p>16 applications. And to the extent that those delays</p> <p>17 involve backlogs at the FBI in terms of name check --</p> <p>18 in terms of name checks, then that would include that</p> <p>19 subject.</p> <p>20 A Okay.</p> <p>21 Q So you're prepared to testify about that</p> <p>22 topic?</p>
<p style="text-align: right;">Page 15</p> <p>1 2005 to 2007. So within that three-year time period</p> <p>2 are you prepared to testify about the issues that I</p> <p>3 just mentioned?</p> <p>4 A Yes, I am.</p> <p>5 Q Okay. How about the surge in applications</p> <p>6 immediately preceding the July 2007 fee increase at</p> <p>7 USCIS? Are you prepared to testify about that topic?</p> <p>8 A Yes, I am.</p> <p>9 Q Same question for the February 2008</p> <p>10 revisions to the name check policy for legal permanent</p> <p>11 residents? Are you prepared to testify about that</p> <p>12 issue?</p> <p>13 A Yes, I am.</p> <p>14 Q And the last topic has to do with any plans</p> <p>15 or proposals by USCIS to eliminate or reduce backlogs</p> <p>16 or delays in the processing of naturalization</p> <p>17 applications of -- of applicants for citizenship</p> <p>18 including, but not limited to, the 2002 backlog</p> <p>19 elimination plan, but other than the 2008 joint plan</p> <p>20 to eliminate backlog? So let me rephrase that.</p> <p>21 A Yeah, please.</p> <p>22 Q Are you prepared to testify about any USCIS</p>	<p style="text-align: right;">Page 17</p> <p>1 A I am going back through my tenure as</p> <p>2 running domestic operations. That does not run back</p> <p>3 to 2002.</p> <p>4 Q When you say, "that does not run back to</p> <p>5 2002" --</p> <p>6 A My tenure in that position doesn't run back</p> <p>7 to 2002.</p> <p>8 Q Which position is that?</p> <p>9 A Associate director of domestic operations.</p> <p>10 Q Okay. I'll review your biography with you</p> <p>11 in just a minute. Maybe you can tell me a little bit</p> <p>12 more about the different positions you've been in and</p> <p>13 what the areas of responsibility are.</p> <p>14 A Sure.</p> <p>15 Q Before I do that let me just ask you one</p> <p>16 more preliminary question. Do you understand,</p> <p>17 Mr. Aytes, what this lawsuit is about?</p> <p>18 A Yes, I do.</p> <p>19 Q Could you tell me what your understanding</p> <p>20 is?</p> <p>21 A My understanding is there are several</p> <p>22 issues that plaintiffs have raised. One is an</p>



<p style="text-align: right;">Page 18</p> <p>1 entitlement to each case being processed within six 2 months. The other is harm with respect to delays 3 associated with case processing in general and with 4 regards to delays caused by the background checks that 5 we conduct, specifically with the FBI. 6 Q Okay. Are there any other issues that 7 this -- that this lawsuit involves in your 8 understanding? 9 A Not my -- you can clarify for me, I'm sure. 10 Q Well, I think what I would tell you about 11 the lawsuit is that it involves first a claim that the 12 changes that CIS made in 2002 to require completion of 13 FBI name checks prior to adjudication of N-400 14 applications as well as the requirement that the FBI 15 search both its main files and it's reference files, 16 that those changes in policies were done without 17 authorization from Congress and, therefore, are in 18 violation of the Administrative Procedure Act. That's 19 one claim in the lawsuit. 20 The other claim is that the current backlog 21 and/or delays in naturalization application processing 22 constitute unreasonable delays under the</p>	<p style="text-align: right;">Page 20</p> <p>1 operating officer for the agency. 2 Q And that would include, of course, 3 supervision of everything having to do with processing 4 of naturalization applications? 5 A Yes, it would. 6 Q And what was your position prior to 7 becoming acting deputy director of the agency? 8 A Associate director for the directorate, 9 which was domestic operations. 10 Q Is it still domestic -- 11 A Yeah. 12 Q Is it still called that? 13 A Yes, it is. 14 Q So there is somebody now who is an 15 associate director of domestic operations? 16 A My deputy is acting in that position. 17 Q And who is that? 18 A Don Neufeld, N-E-U-F-E-L-D. 19 Q And what are the responsibilities of that 20 position, associate director of domestic operations? 21 A Its responsibility is to manage the 22 operations of the directorate, the service centers,</p>
<p style="text-align: right;">Page 19</p> <p>1 Administrative Procedure Act. And so there are two 2 claims under the Administrative Procedure Act. 3 A Okay. 4 Q All right. 5 While we're looking for this document, 6 Mr. Aytes, which is simply a printout of your 7 biography from the CIS web page, let me ask you about 8 some of the positions that I understand you have held. 9 What's your current position right now at CIS? 10 A I'm acting deputy director. 11 Q And how long have you been acting deputy 12 director? 13 A They asked me that yesterday. I guess it's 14 been about two months. 15 Q Okay. Who did you replace? Who was the 16 deputy director before -- 17 A The director left the agency. The deputy 18 director, Jock Scharfen, became acting director, and I 19 moved into his position. 20 Q And what are your responsibilities as 21 acting deputy director? 22 A Easiest way to describe it is chief</p>	<p style="text-align: right;">Page 21</p> <p>1 the local offices, both production operations, 2 management activities and associated policies. 3 Q Okay. And does that -- does that person 4 also oversee -- does that person also supervise the 5 processing of naturalization applications? 6 A Yes. 7 Q And does that person, who's now 8 Mr. Neufeld, does that person report to you as acting 9 deputy director -- 10 A Yes. 11 Q -- of the agency? And who do you report 12 to? 13 A I report to the acting director. 14 Q Who is Mr. Scharfen? 15 A Mr. Scharfen. 16 Q And who does Mr. Scharfen report to? 17 A Mr. Scharfen reports to the deputy 18 secretary. 19 Q Of Homeland Security? 20 A Of Homeland Security. 21 Q Prior to becoming associate director for 22 domestic operations what was your position at CIS?</p>



Page 22

1 A I was the director of the information and  
2 customer service division.

3 Q And what did that involve?

4 A It involved managing the operations of our  
5 call centers and our information services program that  
6 provided information on our website for interaction  
7 with customers in our local offices and associated  
8 customer services.

9 Q Okay. So did that involve all immigration  
10 benefit applications, not just naturalization  
11 applications?

12 A It involved all immigration benefit  
13 applications.

14 Q Okay. So in that capacity you were working  
15 with staff members who were processing adjustments for  
16 LPR status, for example, correct?

17 A Uh-huh.

18 Q As well as naturalization applications?

19 A Yes, we provided customer services  
20 associated with inquiries and the like over the  
21 breadth of applications the agency processed including  
22 both the ones you cited.

Page 23

1 Q Did you have any interactions with the FBI  
2 in that capacity?

3 A No.

4 Q So is it correct to say that the first time  
5 that you had interactions with the FBI involving name  
6 checks and the processing of naturalization  
7 applications was when you became associate director  
8 for domestic operations?

9 A Yes.

10 Q Okay. Prior to being director of  
11 information and customer service -- how long were you  
12 director of information and customer service?

13 A Well, that predated the formation of CIS  
14 back into INS. I'd have to go back and check. It was  
15 probably late '90s.

16 Q When you began serving as director of --

17 A When I took that position.

18 Q And prior to that what was your position at  
19 CIS?

20 A I was a -- for a short time a senior  
21 counselor to the agency.

22 Q What does a senior counselor do?

Page 24

1 A In that -- what I did was a variety of  
2 special project activity. The creation of our new  
3 card production operations, the creation of our call  
4 center operations, those types of activities.

5 Q Okay. And then prior -- when was that  
6 period of time? When were you a senior counselor  
7 at --

8 A That was just for a short period of time, a  
9 year or so, before we established the information and  
10 customer service division.

11 Q Okay. And before that what was your  
12 position, then, at CIS?

13 A Before that I ran the adjudications  
14 division and also managed service center operations,  
15 which was the activities of the four service centers  
16 that INS had at the time.

17 Q For what period of time did you run the  
18 adjudications division?

19 A Mid '90s for a couple of years.

20 Q Okay.

21 A And that was a parallel responsibility. I  
22 managed -- my permanent job was managing service

Page 25

1 center operations.

2 Q And did that include adjudication of  
3 naturalization applications?

4 A The adjudications division was the program  
5 office for naturalization. As a program office back  
6 in the way the agency was constructed at that time, it  
7 didn't have direct operational authority over the  
8 operations in our local offices.

9 Q So you -- so who had responsibility for  
10 supervising the processing -- or the adjudication,  
11 rather, of naturalization applications?

12 A That would have been through the field  
13 services division --

14 Q Okay.

15 A -- agency at that time.

16 Q And you were at headquarters at this  
17 time --

18 A Yes, I was.

19 Q -- when you were heading up the  
20 adjudications division?

21 A Uh-huh.

22 Q Okay. Is there any -- is there any

<p style="text-align: right;">Page 26</p> <p>1 oversight by the adjudications division in</p> <p>2 headquarters over the field offices relating to</p> <p>3 naturalization applications --</p> <p>4 A As a program function there is oversight.</p> <p>5 Q So you had oversight over the adjudication</p> <p>6 of naturalization applications as the head of the</p> <p>7 adjudications division back in the mid '90s --</p> <p>8 A That's correct.</p> <p>9 Q -- is that correct? Okay.</p> <p>10 Did you interact with the FBI during that</p> <p>11 time period regarding name checks in connection with</p> <p>12 naturalization applications?</p> <p>13 MS. ONOZAWA: Asked and answered.</p> <p>14 Q You may answer the question.</p> <p>15 A Not with regards to name checks. Did have</p> <p>16 interaction with the FBI with regards to fingerprint</p> <p>17 check process.</p> <p>18 Q And did that involve adjudication of</p> <p>19 naturalization applications?</p> <p>20 A It involved the adjudication of</p> <p>21 applications in which we conducted a fingerprint</p> <p>22 check, which included naturalization applications.</p>	<p style="text-align: right;">Page 28</p> <p>1 okay. (Complying.)</p> <p>2 Q Does it include all of the positions that</p> <p>3 we have just discussed going back as far as your</p> <p>4 service as head of the adjudications division in the</p> <p>5 mid '90s?</p> <p>6 A It doesn't specifically -- well, it does</p> <p>7 mention assistant commissioner of adjudications, yeah,</p> <p>8 '96 through '97. Yep.</p> <p>9 Q Okay. And so this is an accurate</p> <p>10 representation of your -- of the positions that you've</p> <p>11 had at USCIS since that time period?</p> <p>12 A Yes, it is.</p> <p>13 Q Okay.</p> <p>14 A Lousy picture, but yes.</p> <p>15 Q Have you ever personally adjudicated a</p> <p>16 naturalization application at CIS?</p> <p>17 A Yes, I have.</p> <p>18 Q When was that?</p> <p>19 A Early '80s.</p> <p>20 Q Was that the last time you did so?</p> <p>21 A Personally?</p> <p>22 Q Yes.</p>
<p style="text-align: right;">Page 27</p> <p>1 Q Okay.</p> <p>2 MR. GHACHEM: I'm going to hand the witness</p> <p>3 what I'd like to have marked as Aytes Number 1.</p> <p>4 (Exhibit 1 was marked for identification</p> <p>5 and attached to the deposition transcript.)</p> <p>6 BY MR. GHACHEM:</p> <p>7 Q Okay. Mr. Aytes, I've handed you a</p> <p>8 document that is marked as Aytes Number 1. Do you</p> <p>9 recognize this document?</p> <p>10 A It's from our website.</p> <p>11 Q Okay. Can you tell me what it is?</p> <p>12 A We list bios of key managers on our website</p> <p>13 for customer information.</p> <p>14 Q Okay. But what is this document?</p> <p>15 A This is my bio.</p> <p>16 Q Okay. Is this a current biography?</p> <p>17 A Yes, it is. Well, let's see, does it have</p> <p>18 my -- yeah, it does say "acting." So yeah, it is a</p> <p>19 current bio.</p> <p>20 Q Okay. And does it -- do you want to take a</p> <p>21 moment to take a quick look at it?</p> <p>22 A I don't pay much attention to bios, but --</p>	<p style="text-align: right;">Page 29</p> <p>1 A Yes.</p> <p>2 Q So since the early 1980's -- is that what</p> <p>3 you said --</p> <p>4 A Uh-huh.</p> <p>5 Q -- you have never actually adjudicated a</p> <p>6 naturalization application?</p> <p>7 A Correct.</p> <p>8 Q Have you handled an appeal of an</p> <p>9 adjudication decision on an N-400 application since</p> <p>10 then?</p> <p>11 A I worked at the administrative appellate</p> <p>12 office, but I don't recall ever handling appeals of</p> <p>13 that nature.</p> <p>14 Q Okay. Mr. Aytes, I'm going to ask you a</p> <p>15 few questions now about changes that were made in late</p> <p>16 2002, November 2002 to the agency's policies for the</p> <p>17 handling of name checks in connection with</p> <p>18 naturalization applications. And in particular I'm</p> <p>19 going to refer to two changes. One of the changes was</p> <p>20 the decision to require completion of an FBI name</p> <p>21 check prior to adjudicating an N-400 application. The</p> <p>22 other change I'm going to refer to is the change that</p>

Page 30

1 required the FBI to conduct a search of its reference  
2 files as well as its name files when doing a name  
3 check -- when processing a name check request from  
4 CIS. So prior to --

5 MS. ONOZAWA: I object to these questions  
6 to the extent that they're outside the topics  
7 designated for Mr. Aytes' 30(b)(6) deposition.

8 MR. GHACHEM: Well, I haven't actually  
9 gotten to the topic yet. I'm going to be  
10 referring to the 2002 rule changes in connection  
11 with topics that I think are listed on his  
12 deposition.

13 Q So right now all I'm asking, Mr. Aytes, is  
14 if I use the phrase "2002 rule changes" to refer to  
15 both of the two policy changes from late 2002 that I  
16 just described, will you understand when I use that  
17 phrase, then, "2002 rule changes," what I'm talking  
18 about?

19 A Certainly.

20 Q Okay. Is there a unit, Mr. Aytes, within  
21 CIS that handles changes in the regulations governing  
22 CIS, governing the agency?

Page 31

1 A There are several depending on the  
2 regulation.

3 Q What are the various units that deal with  
4 regulatory changes at CIS?

5 A Well, we have a branch that's integrated  
6 within service center operations called "business and  
7 trade" that coordinates program activities associated  
8 with employment-based cases.

9 There is a regulatory group embedded within  
10 our field operations division that handles regulatory  
11 and programmatic functions associated with  
12 naturalization. For example, there is a separate  
13 regulatory group within our refugee, asylum and  
14 international affairs division that coordinates  
15 programmatic activities for asylum and refugee  
16 processing. And then we have a generalized policy  
17 group within an office policy that is more of an  
18 overall coordinator of regulatory development.

19 Q Okay. So of the various units that you  
20 just mentioned, which one would have had  
21 responsibility for the 2002 rule changes?

22 MS. ONOZAWA: Again, I object to the

Page 32

1 question. I just feel that that's outside the  
2 scope of his 30(b)(6) deposition. He's not here  
3 to testify on behalf of the agency about the 2002  
4 rule change.

5 MR. GHACHEM: Okay. Are you instructing  
6 him not to answer that question.

7 MS. ONOZAWA: Yes.

8 MR. GHACHEM: Okay.

9 Q Does the -- are there any other units  
10 within CIS that deal with regulatory changes at the  
11 agency?

12 A The units I described are the units as they  
13 exist today. That has changed and evolved over time.  
14 In 2002 the structure was somewhat different. I  
15 wasn't directly involved in regulatory development at  
16 that time, so I couldn't tell you.

17 Now just about anyone can be involved in  
18 regulatory development, but the offices that I cited  
19 are the offices that have responsibility for  
20 coordinating and managing those functions.

21 Q Okay. Does CIS have a general counsel or  
22 an office of legal counsel?

Page 33

1 A Yes, they do.

2 Q And do they share responsibility for  
3 regulatory changes at the agency?

4 A They provide legal advice with regards to  
5 our operations and including our regulatory process.  
6 They are a regulatory development or management office  
7 in and of themselves.

8 Q Can you tell me who is the current head of  
9 the unit that handles regulatory changes in the area  
10 of naturalization application processing?

11 A Sorry, I don't know the name of that  
12 manager.

13 Q Okay. Can you give me -- can you tell me  
14 what the name of the unit is?

15 A It's a naturalization program office within  
16 our field operations division. Field operations  
17 division is run by Jack Bulger.

18 Q Can you spell that, please?

19 A B-U-L-G-E-R.

20 Q Is he in Washington?

21 A Yes, he is.

22 Q Do you know who Mark Phillips is?

Page 34

1 A Mark Phillips is a staff officer who's had  
2 various assignments over time.

3 Q Okay. Do you know what his position was in  
4 February of 2007?

5 A I think he was part of our regulatory  
6 program management division.

7 Q Mr. Aytes, what does an FBI name check  
8 involve?

9 A An FBI name check involves the FBI  
10 searching through their records for information  
11 associated with that name.

12 Q What kind of records does the FBI search  
13 when it does a name check?

14 A My understanding is it searches through its  
15 various databases and records for any type of  
16 information pertaining to the name, pertaining to the  
17 individual.

18 Q Does it look into the applicant's criminal  
19 history?

20 MS. ONOZAWA: I object. I'm not sure where  
21 these questions are going, but Mr. Smith has been  
22 designated to testify on behalf of the agency as

Page 35

1 to the purpose, use and value of the FBI name  
2 checks in addition to the types of files or the  
3 information contained in these files. I would  
4 direct the witness not to answer.

5 MR. GHACHEM: Well, topic number 3, which  
6 you've designated Mr. Aytes for, inquires about  
7 the causes of delays in the processing of  
8 naturalization applications and any remedial  
9 efforts that have been implemented to address  
10 delays. Topic number 5 deals with instructions or  
11 directives given by CIS to the FBI to review and  
12 accomplish name checks. And so I think I'm  
13 entitled to ask Mr. Aytes what the agency's  
14 understanding of an FBI name check is in  
15 connection with those topics.

16 MS. ONOZAWA: All right. But I would  
17 caution you not to stray too far into topic number  
18 7. I understand those questions are necessary to  
19 the extent you need to establish a foundation for  
20 his knowledge as to --

21 MR. GHACHEM: What's topic number 7 say?

22 MS. ONOZAWA: The purpose, use and value of

Page 36

1 FBI name checks related to immigration benefit  
2 applications.

3 BY MR. GHACHEM:

4 Q All right. So, Mr. Aytes, would you like  
5 to answer my question, which is what -- does the FBI  
6 name check involve a search into an applicant's  
7 criminal history?

8 A I believe it does give us criminal  
9 information as well as other information. And if I  
10 can clarify, the FBI name check is part of a suite of  
11 background checks the agency runs on certain types of  
12 applications. Now, it's one of those checks that we  
13 conduct.

14 Q And the other two checks, what are the  
15 other two checks?

16 A Well, we run an FBI fingerprint check on  
17 many individuals which is designed to give us  
18 information with regards to arrests and convictions.  
19 And we run a check of a system called "TECS/IBIS,"  
20 T-E-C-S slash I-B-I-S, that is an inspectional system  
21 that gives us access to other information that's been  
22 posted by different agencies.

Page 37

1 Q Okay. Are persons who apply for  
2 naturalization with CIS people who already have lawful  
3 permanent resident status in the United States?

4 A Almost exclusively.

5 Q Are there any -- are there any exceptions  
6 to that?

7 A I think there may be -- you're getting into  
8 technical details. I think there may be a very  
9 limited exception relating to members of the military.  
10 But I'm no longer an expert in that field, so I  
11 couldn't tell you if that still exists.

12 Q And are persons who are lawful permanent  
13 residents of the United States people who have already  
14 been subjected to a criminal history search prior to  
15 becoming --

16 A At the time they became a permanent  
17 resident, whether that may be two years, five years,  
18 20 years, at the time that they became a permanent  
19 resident, yes.

20 Q Okay. And how did CIS accomplish that  
21 criminal history search?

22 A Similarly we conducted -- the TECS/IBIS

<p style="text-align: right;">Page 38</p> <p>1 system that I alluded to did not exist many years ago,  2 but the agency has historically run fingerprint checks  3 and, I believe, name checks.  4 Q Can you tell me how long naturalization  5 applicants reside in the United States on a typical  6 basis before they apply for naturalization?  7 A Typically?  8 Q Yeah.  9 A Even that varies over time. I believe the  10 average is something over ten years. Last year that  11 average increased significantly because a large number  12 of additional folks made the decision that they wanted  13 to become American citizens.  14 Q Okay. So the average naturalization  15 applicant is someone who has been residing in the US  16 for ten years about; is that correct?  17 A Yes, my recollection.  18 MR. GHACHEM: Okay. I'd like to have this  19 document marked as Aytes Number 2.  20 (Exhibit 2 was marked for identification  21 and attached to the deposition transcript.)  22 BY MR. GHACHEM:</p>	<p style="text-align: right;">Page 40</p> <p>1 reasons the 2002 name check rule was implemented.  2 That has been designated -- Mr. Collette has been  3 designated to be the agency's 30(b)(6) witness as  4 to the reasons underlying the 2002 name check rule  5 change.  6 MR. GHACHEM: Okay. Well, Tomoko, if you  7 look to -- well, if you just look to the first  8 page, you see that the document has to do with a  9 recheck of the 2.2 million names of naturalization  10 applicants that took place in 2002, which is a  11 cause of delay of the naturalization applications,  12 right? And therefore, it falls under --  13 (Interruption.)  14 MR. GHACHEM: -- and therefore, it falls  15 under topic number 3, causes of delays and/or  16 backlogs in the processing of naturalization  17 applications.  18 MS. ONOZAWA: Understood. I just wanted to  19 clarify for the record that to the extent there  20 are any questions about this document that relate  21 to the name check rule change itself I would  22 object.</p>
<p style="text-align: right;">Page 39</p> <p>1 Q Mr. Aytes, I'm handing you a document that  2 is titled at the top, "Federal Bureau of  3 Investigation." The date is December 13, 2002. It is  4 addressed to the FBI Director's Office. Do you  5 recognize this document?  6 A No, I don't. Doesn't -- I may not -- have  7 seen it at some point, but I do not recognize it.  8 Q Sorry, let me clarify your answer there.  9 Are you saying you may have seen this document or you  10 haven't --  11 A Can't tell you definitively that I have or  12 have not seen this document.  13 Q Can you just take a minute, Mr. Aytes, and  14 look through it? Then I'll ask you a few follow-up  15 questions about it.  16 A (Complying.) Okay.  17 Q Okay. What does this document appear to be  18 about?  19 MS. ONOZAWA: I have to object to any  20 questions that relate to this document as they  21 relate to topic number 6, which is the 2002 name  22 check rule including, but not limited to, the</p>	<p style="text-align: right;">Page 41</p> <p>1 Q Mr. Aytes, you can answer my question.  2 A Could you repeat the question?  3 Q What does this document appear to you to be  4 about?  5 A Appears to be about modifications to the  6 criteria for conducting name checks and for rerunning  7 a population of checks.  8 Q If you look at the first page of the  9 document, Mr. Aytes, do you see it says, "This  10 summer" -- under "Synopsis" midway through the page,  11 "This summarizes the current status of name checks for  12 the Immigration and Naturalization Service and  13 recommends approval for the FBI to waive one-half of  14 the user fees recheck 2.2 million names of aspiring  15 citizens"?  16 A Yes.  17 Q Did CIS ask the FBI to recheck 2.2 million  18 names of N-400 applicants in 2002?  19 A From my reading of this document, it did.  20 Q What about from your experience as an  21 official at USCIS?  22 A My recollection is that the agency did ask</p>



<p style="text-align: right;">Page 42</p> <p>1 the FBI to rerun over 2 million name checks.</p> <p>2 Q Why did it do so?</p> <p>3 A It do so because it felt that the criteria</p> <p>4 that had been used at the time were -- that they were</p> <p>5 originally run were incomplete and did not completely</p> <p>6 search the FBI's records.</p> <p>7 Q Why did it feel that way? Why --</p> <p>8 A Because --</p> <p>9 Q Sorry, let me complete my question,</p> <p>10 Mr. Aytes. Why did the agency feel that the FBI</p> <p>11 searches were not complete?</p> <p>12 A Because there were a couple of example</p> <p>13 cases that caused us to -- again, my recollection --</p> <p>14 to ask them to restate what their criteria were, what</p> <p>15 databases and records they were searching and not</p> <p>16 searching. And when they've -- it was determined that</p> <p>17 that was not a complete search of their records, that</p> <p>18 steps needed to be taken to rerun those names against</p> <p>19 their full records.</p> <p>20 Q Can you look at page 2 of this document?</p> <p>21 A Uh-huh.</p> <p>22 Q Do you see where it says "'missed' name</p>	<p style="text-align: right;">Page 44</p> <p>1 final results of a name check before it makes a</p> <p>2 decision on an application, especially for</p> <p>3 citizenship.</p> <p>4 Q When you say the agency waits on a final</p> <p>5 decision from the FBI for a naturalization</p> <p>6 application, what time period are you referring to?</p> <p>7 A I'm speaking of now, but I believe that</p> <p>8 that was the policy at that point as well.</p> <p>9 Q What point is that?</p> <p>10 A Back in 2002.</p> <p>11 Q At what point in time in 2002?</p> <p>12 A I'm not aware that -- I'm not personally</p> <p>13 aware that the agency -- let me think.</p> <p>14 Back in the 1990s the agency used to move</p> <p>15 forward with applications assuming that the FBI would</p> <p>16 have notified us within a certain period of time if</p> <p>17 there had been any derogatory information either from</p> <p>18 the criminal check, the fingerprint check or the name</p> <p>19 check. That policy was later modified. Specifically</p> <p>20 I was involved in the modification on the fingerprint</p> <p>21 check. I believe it was subsequently modified with</p> <p>22 regards to name checks, but given that I wasn't</p>
<p style="text-align: right;">Page 43</p> <p>1 check" in the middle?</p> <p>2 A Uh-huh.</p> <p>3 Q And underneath that it reads, "INS recently</p> <p>4 notified the FBI that one of the names searched with a</p> <p>5 'no record' response has subsequently been determined</p> <p>6 to be involved in a foreign counterintelligence</p> <p>7 investigation."</p> <p>8 A Uh-huh.</p> <p>9 Q Is that one of the incidents that you just</p> <p>10 referred to?</p> <p>11 MS. ONOZAWA: Objection. I just see this</p> <p>12 as covering topic number 6, which is designated to</p> <p>13 Mr. Collette. Direct the witness not to answer.</p> <p>14 Q Let me rephrase my question for you,</p> <p>15 Mr. Aytes. When the INS requested the FBI to recheck</p> <p>16 2.2 million names in 2002, did that cause a delay in</p> <p>17 the processing of naturalization applications at CIS?</p> <p>18 A Yes, it did.</p> <p>19 Q Why did it do that?</p> <p>20 A Why did it cause a delay?</p> <p>21 Q (Nodding head up and down.)</p> <p>22 A Because the agency waits until it gets the</p>	<p style="text-align: right;">Page 45</p> <p>1 personally involved in that, I couldn't tell you the</p> <p>2 date.</p> <p>3 Q When did the fingerprint modification roll</p> <p>4 into place?</p> <p>5 A That was in around '96?</p> <p>6 Q Did INS in 2002 ask the FBI to recheck 2.2</p> <p>7 million names because FBI had returned a "no record"</p> <p>8 response in connection with a naturalization applicant</p> <p>9 who had filed in the Newark, New Jersey field office?</p> <p>10 A Well, that's what's stated here that you</p> <p>11 just cited on page 2. You've offered some additional</p> <p>12 details. There was a Newark case that I've been told</p> <p>13 of that did give the agency pause and was one of the</p> <p>14 reasons why the agency went back to the FBI to ask for</p> <p>15 a greater understanding of what databases they -- and</p> <p>16 records the Bureau was searching and not searching.</p> <p>17 Q So you believe that that incident involving</p> <p>18 the --</p> <p>19 MS. ONOZAWA: Objection.</p> <p>20 Q -- applicant out of the Newark, New</p> <p>21 Jersey --</p> <p>22 MS. ONOZAWA: Objection. This is outside</p>

<p style="text-align: right;">Page 46</p> <p>1 the scope of the 30(b)(6) deposition. I think  2 we've established that 2.2 names were rerun as a  3 result of this incident, and I think that's  4 relevant to the reasons for any delays or backlogs  5 it would have caused after that, which is relevant  6 to topic number 3. I would direct the witness not  7 to answer.</p> <p>8 MR. GHACHEM: Well, answer what? I haven't  9 even asked the question.</p> <p>10 MS. ONOZAWA: I just believe this is  11 straying into the topics of the reasons for the  12 2002 name check change, which, again, is not a  13 topic that Mr. Aytes has been designated to  14 testify on behalf of the agency.</p> <p>15 Q All right. I'll rephrase my question for  16 you, Mr. Aytes. The incident from 2002 involving an  17 applicant who applied through the Newark, New Jersey  18 field office and who was later found out to be,  19 according to the FBI, affiliated with a terrorist  20 organization, did the FBI ever uncover a criminal  21 record on that person?</p> <p>22 MS. ONOZAWA: I object as outside the scope</p>	<p style="text-align: right;">Page 48</p> <p>1 described specific responsibilities that adjudicators  2 had with respect to certain background checks and  3 reviews of INS and other records.</p> <p>4 Q Is this the document that implemented the  5 2002 rule changes?</p> <p>6 A That you were speaking of earlier?</p> <p>7 Q Yeah. Again just to remind you, when I say  8 "2002 rule changes" --</p> <p>9 A Yes.</p> <p>10 Q -- I mean the requirement of a definitive  11 response from the FBI as well as the requirement that  12 the FBI search both the reference and the main files.</p> <p>13 Is this the document that implemented for  14 CIS the 2002 rule changes?</p> <p>15 MS. ONOZAWA: I object to that question.  16 It relates to topic number 6, which is outside the  17 scope of his 30(b)(6) deposition.</p> <p>18 MR. GHACHEM: Topic number 4 reads,  19 "Decisions related to the processing of  20 naturalization applications." Again, this is  21 something that may fall under topic number 6 as  22 well, but topic number 4 clearly encompasses this</p>
<p style="text-align: right;">Page 47</p> <p>1 of this 30(b)(6) topic. I direct the witness not  2 to answer.</p> <p>3 MR. GHACHEM: Okay. Can we just take a  4 quick break, Mr. Aytes? I'm going to confer with  5 your attorney outside the room and I'll be right  6 back.</p> <p>7 THE WITNESS: Sure.</p> <p>8 MR. GHACHEM: Thanks.</p> <p>9 (Recess taken.)</p> <p>10 MR. GHACHEM: Okay. I'd like to have this  11 document marked as Aytes Number 3.  12 (Exhibit 3 was marked for identification  13 and attached to the deposition transcript.)</p> <p>14 BY MR. GHACHEM:</p> <p>15 Q Mr. Aytes, I'm handing you a document that  16 is marked Aytes Number 3. The Bates number on the  17 beginning page is CIS 002555. It's dated November 13,  18 2002. Do you recognize this document?</p> <p>19 A Yes, I've seen this.</p> <p>20 Q Can you tell me what this is?</p> <p>21 A It's a memorandum from the then executive  22 associate commissioner for field operations that</p>	<p style="text-align: right;">Page 49</p> <p>1 document. I'd like to be able to ask my question  2 before you -- before you instruct the witness not  3 to answer.</p> <p>4 MS. ONOZAWA: You're asking Mr. Aytes if  5 this is the document that implemented the 2002  6 rule change, and that's outside the scope of this  7 deposition testimony. At least he's not  8 designated to speak as the agency representative  9 as to which document implemented the 2002 rule  10 change.</p> <p>11 MR. GHACHEM: Is he designated as the  12 person to speak about decisions related to the  13 processing of naturalization applications under  14 topic 4?</p> <p>15 MS. ONOZAWA: Topic 4 is --</p> <p>16 MR. GHACHEM: Topic 4, "Staffing and/or  17 resource requests and/or decisions related to the  18 processing of naturalization applications." This  19 is a document that has to do with how adjudicators  20 processed naturalization applications.</p> <p>21 MS. ONOZAWA: I would direct the witness to  22 answer "yes" or "no" if he knows that, but any</p>



<p style="text-align: right;">Page 50</p> <p>1 further questions about the 2002 name check rule</p> <p>2 change I would --</p> <p>3 Q You may answer my question, Mr. Aytes.</p> <p>4 A From the face of this, this did not</p> <p>5 implement those changes. This is simply an</p> <p>6 instruction to adjudicators that says you have to</p> <p>7 review the actual A-file, which is the account-based</p> <p>8 file that we maintained on an individual, and that you</p> <p>9 have to review the final results of the FBI name</p> <p>10 check. It doesn't allude to any changes or</p> <p>11 modifications on how the FBI name check is -- search</p> <p>12 is conducted by the FBI.</p> <p>13 Q Can you look to page 2 of the document?</p> <p>14 A Uh-huh.</p> <p>15 Q Can you read the first paragraph marked</p> <p>16 number 2 there near the top of the page?</p> <p>17 A "If in response to a name check the FBI</p> <p>18 indicates to the INS that a record may possibly exist</p> <p>19 referred to in service guidance as 'IP' or 'indices</p> <p>20 popular,' the application may not be decided until the</p> <p>21 adjudicator obtains and reviews the information and</p> <p>22 receives a specific determination from the FBI that</p>	<p style="text-align: right;">Page 52</p> <p>1 Q What is his current position?</p> <p>2 A I believe Mr. Williams is retired.</p> <p>3 Q Can you tell me what prompted Mr. Williams</p> <p>4 to issue this memo?</p> <p>5 MS. ONOZAWA: Objection, calls for</p> <p>6 speculation.</p> <p>7 Q You may answer the question.</p> <p>8 A Other than inferring from the face of the</p> <p>9 memo itself, no, I can't.</p> <p>10 Q Well, what would you infer from the face of</p> <p>11 the memo was the cause of Mr. Williams' issuing this</p> <p>12 memo?</p> <p>13 A To ensure that adjudicators waited to</p> <p>14 review the final answer from the FBI, that they</p> <p>15 reviewed the results of the separate IBIS background</p> <p>16 check that was conducted, and that they went through a</p> <p>17 series of stipulated procedures to ensure that,</p> <p>18 wherever possible, the actual permanent A-file was</p> <p>19 available and had been reviewed before making a</p> <p>20 decision on an application.</p> <p>21 Q Did the decision to require adjudicators to</p> <p>22 await a definitive response from the FBI on name</p>
<p style="text-align: right;">Page 51</p> <p>1 the record does not relate to the applicant. The</p> <p>2 disposition of the IP response must be documented in</p> <p>3 the file."</p> <p>4 That simply says that you have to get the</p> <p>5 FBI's final answer before you can proceed with an</p> <p>6 adjudication. Whether or not this is the document</p> <p>7 that implemented that change of you have to wait for a</p> <p>8 final answer I couldn't tell you.</p> <p>9 Q Is there -- is there another document that</p> <p>10 did that, that implemented the 2002 rule changes?</p> <p>11 A As I said before, I'm not aware when there</p> <p>12 was a change specifically as to you have to wait for</p> <p>13 the result of the name check as opposed to initiating</p> <p>14 the name check and waiting for a stipulated period of</p> <p>15 time. So that may have been done at 2002, it may have</p> <p>16 been done separately. Because I wasn't involved in</p> <p>17 managing this aspect of operations at the time I</p> <p>18 couldn't tell you.</p> <p>19 Q Who was Johnny Williams?</p> <p>20 A Johnny Williams was at the time the</p> <p>21 executive associate commissioner for field operations</p> <p>22 in INS.</p>	<p style="text-align: right;">Page 53</p> <p>1 checks cause delays in the processing of</p> <p>2 naturalization applications at CIS?</p> <p>3 A As opposed to proceeding absent a final</p> <p>4 result?</p> <p>5 Q Correct.</p> <p>6 A Certainly.</p> <p>7 Q Prior to 2002 did CIS require completion of</p> <p>8 FBI name checks before making a decision on a</p> <p>9 naturalization application?</p> <p>10 A As I said, I'm not sure of the time frame</p> <p>11 in which the agency changed its position from ensure</p> <p>12 that you've requested it, wait a stipulated period of</p> <p>13 time because we're certain that the FBI will respond</p> <p>14 with negative information, if there is on the case,</p> <p>15 and if they don't you're free to proceed, to a</p> <p>16 standard of no, we're going to wait until we get their</p> <p>17 final answer because, you know, we've realized that</p> <p>18 their processing time has attenuated.</p> <p>19 Q Okay. So the answer is you don't know when</p> <p>20 the --</p> <p>21 A I don't know definitively when that change</p> <p>22 was made. And I can't tell you whether or not this</p>

Page 54

1 was the memo that executed that change with respect to  
2 name check.

3 Q What else can you tell me about this memo?

4 MS. ONOZAWA: Objection, vague.

5 Q You may answer the question.

6 A I can read it to you. Otherwise I've told  
7 you what, based on my reading, the important  
8 particulars are.

9 Q Is this memo still in force at CIS?

10 A It -- to my knowledge, it was never  
11 specifically rescinded. However, procedures have in  
12 some respects subsequently been modified.

13 Q When you say that procedures have been  
14 modified, can you tell me how they have been modified  
15 from the procedures that are described in this memo?

16 A The NQP guidance that's referred to, which  
17 is National Quality Procedures, for naturalization  
18 applications have been modified since 2002. And there  
19 have been significant additional materials given to  
20 adjudicators with respect to how to conduct an IBIS  
21 check, for example. And there have been some changes  
22 made with regards to the policies, including my memo

Page 55

1 of February, with respect to adjustment applications  
2 as to in which cases -- on what types of applications  
3 we will definitively always wait before making a  
4 final -- before making a decision on the application.

5 Q When you referred to your memo of February,  
6 is that your member dated February 4, 2008, making  
7 changes in the processing of LPR adjustment  
8 applications?

9 A Of adjustment applications. I don't recall  
10 if it was the 4th, but yes.

11 Q Other than the changes you've just  
12 described to me, are there any other ways in which INS  
13 has since November 13, 2002 modified the guidelines  
14 that are contained in this memo?

15 A This is such a broad area of IBIS checks,  
16 fingerprint checks, A-file review, I'm sure there are  
17 a number of minor or major revisions over time. We're  
18 talking about stipulated procedures from almost six  
19 years ago, so I'm sure there are a few documents that  
20 will in some way modify procedures with regards to the  
21 processing of an application or petition. So I can't  
22 tell you definitively that the ones that I've

Page 56

1 mentioned are the only ones that could have affected  
2 in some way the mandate laid out in this instruction.

3 Q Do you know if there are any instructions  
4 subsequent to November 13, 2002, that have modified  
5 how the agency processes naturalization applications  
6 in particular?

7 MS. ONOZAWA: Objection, vague and  
8 overbroad. You can answer.

9 A There are -- I couldn't even count the  
10 number of memos that we have probably sent that in  
11 some way, shape or form give instruction or modify or  
12 clarify the processing of naturalization applications  
13 from eligibility criteria to process steps, the  
14 institution of decisional quality review, the  
15 modifications over time to the national quality -- NQP  
16 procedures. There have been a number of substantive  
17 and nonsubstantive changes in procedures.

18 Q Do any of those substantive or  
19 nonsubstantive changes in procedures involve changes  
20 in the FBI name check policy?

21 A No, the FBI name check policy continues to  
22 be that we will wait for a final answer from the FBI

Page 57

1 before we make a decision on a naturalization  
2 application. We have, as that February memo mentions,  
3 made some changes with regards to adjustment case  
4 processing.

5 Q Okay. So as regards FBI name checks,  
6 Mr. Williams' November 13, 2002 memo remains in force  
7 at CIS; is that correct?

8 A Yes. The policy is still to wait for a  
9 final answer.

10 Q Have there been any discussions in 2008  
11 about changing that policy?

12 A In the context of the modifications that we  
13 made for adjustment processing there were discussions  
14 about whether or not that change should be made and  
15 whether or not that change should be broader and  
16 should affect other types of applications.

17 Q Did that -- did those other types of  
18 applications include naturalization applications?

19 A There were discussions. Can't say no one  
20 ever mentioned the word "naturalization applications"  
21 in the context of that policy. The agency's decision  
22 was we were not going to modify that policy with

Page 58

1 respect to naturalization.

2 Q When did the discussions that you just  
3 referred to take place, the discussions involving  
4 possible change to the requirements for FBI name  
5 checks in connection with naturalization applications?

6 MS. ONOZAWA: Objection. I'm not sure how  
7 that answer -- or that question relates to any of  
8 the 30(b)(6) topics designated -- for which  
9 Mr. Aytes is designated to testify on.

10 MR. GHACHEM: Topic 4, decisions related to  
11 the processing of naturalization applications.

12 Q You can answer my question, Mr. Aytes.

13 A There were discussions about what changes  
14 we might wish to make. A government agency is always  
15 looking for ways to do things better, so you're always  
16 talking about possibilities. The fact that you  
17 discuss a possibility doesn't mean that it's  
18 preferable.

19 We discussed what the limitations should be  
20 with respect to -- and whether or not we should make  
21 any change in our preexisting policy of always waiting  
22 for a definitive response from the FBI on a check --

Page 59

1 on a name check before proceeding to adjudication.  
2 The decision was that we were comfortable in making  
3 that policy change with regards to adjustment cases  
4 because, one, it was consistent with policy --  
5 preexisting policy that ICE had in removal proceedings  
6 where adjustment can also be granted. Also, because  
7 it didn't change the status quo. A person who is an  
8 applicant for permanent residence is already entitled  
9 to work authorization, travel authorization and is  
10 allowed to remain in the United States while their  
11 application is pending. And because we could, if  
12 based on cause, as a result of any final information  
13 that we get from the FBI initiate rescission and/or  
14 removal proceedings on an adjustment applicant.

15 So we felt that there were sufficient  
16 grounds to distinguish an adjustment application from  
17 a naturalization application, for example, and proceed  
18 absent the FBI's final answer.

19 MS. ONOZAWA: It's been about an hour. I  
20 suggest we take a break.

21 MR. GHACHEM: You want to take a break?  
22 Sure.

Page 60

1 (Recess taken.)

2 BY MR. GHACHEM:

3 Q Mr. Aytes, you testified just before the  
4 break that there were discussions at CIS in 2008 about  
5 whether to extend the February 2008 LPR change to  
6 naturalization applications as well; is that correct?

7 A At the time we were formulating the policy,  
8 it wasn't subsequent, at the time we were talking  
9 about doing this for adjustment cases of course we  
10 talked about other possibilities, including whether it  
11 should encompass other applications.

12 Q And did those other applications include  
13 naturalization applications specifically?

14 A Yes.

15 Q Did the discussions include any discussion  
16 about whether or not CIS is required to await the  
17 completion of an FBI name check before adjudicating a  
18 naturalization application?

19 MS. ONOZAWA: I would object to that  
20 question as subject to the deliberative process  
21 privilege. To the extent you can answer it  
22 without revealing any communications, proposals or

Page 61

1 discussions that form part of the process of  
2 formulating a decision, then you may answer it.  
3 A Not to my knowledge, because the agency's  
4 position is why would you initiate a name check if  
5 you're not going to wait for the answer? Why would  
6 you initiate any kind of background check if you're  
7 not going to wait for the answer?  
8 Q Are there any other reasons why the agency  
9 takes that position; namely, the position that  
10 awaiting completion of an FBI name check is necessary  
11 to adjudicate a naturalization application?

12 A The agency conducts its background checks  
13 for specific reasons to determine whether or not the  
14 person is eligible for the benefit that they seek.  
15 And so given that we conduct the check for that  
16 purpose, proceeding to grant a benefit before you have  
17 the results of that check, unless that benefit can be  
18 readily rescinded, would not make any sense.

19 Q Are there any other reasons why the agency  
20 believes it is not appropriate to adjudicate a  
21 naturalization application prior to receiving a  
22 definitive response on an FBI name check?

Page 62

1 A Just what I've articulated. We conduct it  
2 for cause and we don't believe that -- we never  
3 seriously discussed extending this to naturalization  
4 because naturalization is a benefit that cannot be  
5 readily rescinded.

6 Q Did the agency require completion of FBI  
7 name checks in connection with adjudicating  
8 naturalization applications prior to 2002?

9 A As I said, I don't recall when the agency  
10 moved from the posture of initiating the check, and  
11 based on information from the FBI that they were  
12 completing the process within a given time frame, only  
13 waiting for that time frame for a response and  
14 assuming that no response was a negative response to  
15 moving to a definitive check on the name check. I can  
16 tell you that we made that change with regards to  
17 fingerprints back in the mid '90s, around '96.

18 Q Well, was there ever a time, to your  
19 knowledge, when CIS did not await a definitive  
20 response on FBI name checks before adjudicating  
21 naturalization applications?

22 A I believe that was the policy in the early

Page 63

1 '90s and before, but it was predicated on information  
2 from the FBI that they were completing these name  
3 checks and fingerprint checks within a given period of  
4 time. And so we were free to move forward if we did  
5 not hear within that period of time.

6 Q So is your testimony that it was only in  
7 the early 1990s, to your knowledge, that CIS would  
8 proceed with adjudications of naturalization  
9 applications without awaiting a definitive name check  
10 response from the FBI?

11 A Early '90s and before, yeah. And I can't  
12 tell you when the policy changed to wait for a  
13 definitive response.

14 Q How about 1999?

15 A Can't --

16 Q What was the practice in 1999, to the best  
17 of your knowledge?

18 MS. ONOZAWA: I would object to that.  
19 These questions are also touching -- running into  
20 30(b)(6) topic 7, which relates to the use of the  
21 FBI name checks related to immigration benefit  
22 applications.

Page 64

1 MR. GHACHEM: Well, Tomoko, that's the  
2 entire lawsuit. I mean, topic 4 is decisions  
3 related to processing of naturalization  
4 applications and that --

5 MS. ONOZAWA: My concern is that you're  
6 reading topic 4 to such an extent that you're --  
7 that is encompassing questions in topic 7 which  
8 are specifically designated to a different  
9 30(b)(6) witness.

10 MR. GHACHEM: Well, I think I'm following  
11 up on testimony that Mr. Aytes has given today,  
12 and so I think I'm entitled to ask him about the  
13 scope of certain answers that he's given. And one  
14 of the things that he's testified to is that --  
15 he's testified, first, that he doesn't know when  
16 the 2002 rule changes were first implemented, but  
17 he's also testified that in the early 1990s the  
18 agency did not await a final name check response  
19 prior to adjudicating a naturalization  
20 application. And I'm asking him about other time  
21 periods.

22 MS. ONOZAWA: And I think all this -- it's

Page 65

1 really straying outside the 30(b)(6) topics for  
2 which he's been designated to speak on.

3 A Let me put it this way: I told you before  
4 I do not recall the exact date or even approximate  
5 date when the agency moved to a definitive -- to  
6 waiting for a definitive reply from the FBI.

7 I do know that like fingerprints, those  
8 changes were made because our understanding was that  
9 the FBI was no longer able to provide those responses  
10 within a given time frame. And so we could no longer  
11 assume that absent an answer within that time frame  
12 that the answer was no record.

13 Q And were there any other reasons why you  
14 implemented that change other than the fact that you  
15 could no longer assume that an answer would be given  
16 within a certain time frame to a name check request?

17 A No. Again, you don't initiate -- you don't  
18 conduct a background check, you don't initiate a  
19 review unless you're prepared to complete the review.

20 MR. GHACHEM: I'd like this marked as Aytes  
21 Number 4.

22 (Exhibit 4 was marked for identification

Page 66

1 and attached to the deposition transcript.)  
 2 BY MR. GHACHEM:  
 3 Q Mr. Aytes, I'm handing you a document that  
 4 I'm marking as Aytes Exhibit Number 4. The Bates  
 5 number is CIS 00 --  
 6 (Interruption.)  
 7 MR. GHACHEM: I'm about to get into a  
 8 fairly in-depth inquiry about this. Do you need  
 9 to talk to --  
 10 MS. ONOZAWA: Yes.  
 11 MR. GHACHEM: Let's take a quick break.  
 12 (Recess taken.)  
 13 BY MR. GHACHEM:  
 14 Q So before the break, Mr. Aytes, I had just  
 15 handed you a document that is now marked Aytes Exhibit  
 16 Number 4. The Bates number on the first page is  
 17 CIS 006284. Do you recognize this document?  
 18 A Yes, I do.  
 19 Q What is it?  
 20 A It's a memo that I signed February the 4th,  
 21 2008, that modified our policy with regards to  
 22 adjustment applications and the name check.

Page 67

1 Q Okay. And is this an accurate copy of that  
 2 memo?  
 3 A Appears to be.  
 4 Q Mr. Aytes, before you issued this memo on  
 5 February 4 -- strike that.  
 6 The date of this memo is February 4, 2008;  
 7 is that correct?  
 8 A Yes.  
 9 Q Before you issued this memo, Mr. Aytes, on  
 10 February 4, 2008, did CIS engage in any analysis of  
 11 the impact that the LPR change would have on national  
 12 security or public safety?  
 13 MS. ONOZAWA: And I would direct the  
 14 witness to answer that to the extent the answer  
 15 would not reveal any communications protected by  
 16 the deliberative process privilege.  
 17 A Actually I think I've answered that in an  
 18 earlier response. The agency said we are going to  
 19 come in compliance with ICE's preexisting policy in  
 20 this regard and said we're not changing the national  
 21 security status quo through this decision because an  
 22 adjustment applicant already has employment

Page 68

1 authorization, permission to remain in the United  
 2 States, permission to travel in and out of the United  
 3 States. And since adjustment -- since permanent  
 4 residence is a condition that can be rescinded and can  
 5 be taken away in removal proceedings that the agency  
 6 did not feel it was changing the national security  
 7 status quo relative to our preexisting policy.  
 8 Q My question was did the agency engage in  
 9 any analysis or discussions of the impact of this  
 10 policy on national security or public safety.  
 11 A Only as I've just alluded to.  
 12 Q So is the answer that there were  
 13 discussions of the impact of this policy on national  
 14 security or public safety or that there were not?  
 15 A There were discussions that there were  
 16 no -- that there was no substantive impact as a result  
 17 of this policy change.  
 18 Q What do you mean by "substantive impact"?  
 19 A As -- as I just explained, that it did not  
 20 change the status quo from a national security  
 21 perspective.  
 22 Q Do you remember when those discussions were

Page 69

1 held?  
 2 A In the month or so prior to the issuance of  
 3 the memo.  
 4 Q Are there any documents that reflect those  
 5 discussions?  
 6 MS. ONOZAWA: Again, I would direct the  
 7 witness not to answer to the extent that it would  
 8 reveal communications or documents covered by the  
 9 deliberative process privilege.  
 10 A I'm not aware -- the nature of discussions  
 11 is discussions. I'm not aware that there was -- were  
 12 papers written laying out different policy positions  
 13 on the matter.  
 14 Q Were there any e-mails exchanged about that  
 15 subject?  
 16 A Certainly possible.  
 17 Q Did you write any e-mails about the  
 18 implications of this policy change for national  
 19 security or public safety?  
 20 MS. ONOZAWA: Again, I would direct the  
 21 witness not to answer to the extent that doing so  
 22 would reveal the nature or the substance of any



<p style="text-align: right;">Page 70</p> <p>1 communications he might have had predating the 2 2008 LPR change.</p> <p>3 A Be hard for me to answer that question in 4 the fact that I do send and receive lots and lots of 5 e-mails. They're an electronic form of discussions. 6 Whether or not I sent or received any e-mails that 7 talked about the national security implications of 8 this policy as opposed to a verbal discussion around 9 the table, it's quite possible. I can't tell you 10 definitively that I did or that I didn't.</p> <p>11 Q Did you confer with the FBI before issuing 12 this memo --</p> <p>13 A I did not.</p> <p>14 Q -- on February 4, 2008?</p> <p>15 A I did not. Subordinates did.</p> <p>16 Q Who were they?</p> <p>17 A Greg Smith had ongoing discussions with the 18 FBI. He was our -- had been appointed to manage 19 issues associated with the name check with the Bureau.</p> <p>20 Q Did those discussions relate to this 21 February 4, 2008 memo?</p> <p>22 A I don't know if he specifically discussed</p>	<p style="text-align: right;">Page 72</p> <p>1 referencing was, as I mentioned earlier, to initiate 2 the checks, but then to proceed in adjustment 3 applicants because they could rescind that status if 4 it was later deemed necessary and appropriate.</p> <p>5 Our policy up until this memorandum was not 6 to proceed, but to continue to wait until we got a 7 definitive decision this policy change brought our 8 procedures -- or made them consistent with the 9 procedures that ICE had been using for years.</p> <p>10 Q Is it the practice of CIS to align its 11 policies regarding applications for adjustment of LPR 12 status with ICE practices and policies?</p> <p>13 A You're adjudicating the same benefit. And 14 so by and large you at least want to be aware of the 15 procedures that another agency uses in its procedures 16 to adjudicate that benefit.</p> <p>17 Does it require that you be absolutely 18 aligned? No, because there are some changes and some 19 differences in the agencies. But we felt that with 20 respect to adjustment processing that it made sense 21 for us to adopt the ICE practice.</p> <p>22 Q So who adjudicates applications for</p>
<p style="text-align: right;">Page 71</p> <p>1 the possibility or even notified them of the change. 2 He may have.</p> <p>3 Q Can you look to the first page of the 4 Michael, Mr. Aytes, please?</p> <p>5 A Yes, sir.</p> <p>6 Q The second paragraph begins, "USCIS is 7 issuing revised guidance in response to 8 recommendations of the DHS Office of Inspector General 9 regarding the need to align the agency's background 10 and security check policies with those of US 11 Immigration and Customs Enforcement (ICE)."</p> <p>12 A Uh-huh.</p> <p>13 Q What did you mean when you said 14 "regarding" -- when you wrote in this memo, "regarding 15 the need to align the agency's background and security 16 check policies with those of US Immigration and 17 Customs Enforcement"?</p> <p>18 A As I mentioned earlier, adjustment status 19 is a benefit that is adjudicated both by USCIS and in 20 some instances is adjudicated by an immigration judge 21 in removal proceedings.</p> <p>22 The preexisting ICE policy that the OIG is</p>	<p style="text-align: right;">Page 73</p> <p>1 adjustment and LPR status? Is it ICE or is it CIS or 2 both?</p> <p>3 A Both -- it's not ICE. It's an immigration 4 judge.</p> <p>5 Q What is ICE's role, then, in processing of 6 applications?</p> <p>7 A ICE handles the associated processing and 8 represents the government before the immigration 9 judge.</p> <p>10 Q And what is CIS's role in the processing of 11 adjustment applications?</p> <p>12 A CIS handles the entire process, the 13 processing of the application and the decision-making 14 process.</p> <p>15 When a person applies for adjustment of 16 status before an immigration judge it is in removal 17 proceedings and it is a benefit that is available in 18 some instances in removal proceedings. Some people 19 may only apply for adjustment in removal proceedings, 20 but the vast majority of adjustment applications are 21 handled by CIS.</p> <p>22 Q So do you -- does an applicant have to be</p>

Page 74

1 in removal proceedings in order to apply for  
2 adjustment to LPR status?  
3 A Only before an immigration judge. If the  
4 person is already in proceedings, the immigration  
5 judge has jurisdiction over the adjustment  
6 application, whereas if the person is not in  
7 proceedings and is eligible to apply, CIS would have  
8 jurisdiction over their application.

9 Q And would ICE have any role in the  
10 processing of the adjustment application where an  
11 applicant is not in removal proceedings?

12 A No. CIS handles that entire process.

13 Q So would there be any reason for CIS in  
14 those cases to coordinate its policies with ICE?

15 A Only in the sense that you're adjudicating  
16 the same eligibility for the same benefit of permanent  
17 residence and so you would desire to have some  
18 consistency of practice. The DHS OIG, you know,  
19 pointed out that there was an anomaly with respect to  
20 our positions in terms of name checks in adjustment  
21 cases.

22 Q Did this February 4, 2008 memo apply only

Page 75

1 to applications for adjustment to LPR status submitted  
2 by persons in removal proceedings?

3 A This memorandum?

4 Q This memorandum.

5 A This memorandum applied to those  
6 individuals who are adjustment applicants before CIS.  
7 The policy alluded to here that ICE has is the policy  
8 with respect to how they and the immigration judges  
9 proceed in removal proceedings.

10 Q Okay. So the -- so the policy that was  
11 implemented on February 4, 2008 is a policy that  
12 applies to all applicants for adjustment to LPR status  
13 regardless of whether or not they're in removal  
14 proceedings or not; is that correct?

15 A Well, it brought us into a consistent  
16 practice with ICE, and so now that is the prevailing  
17 practice for all adjustment applicants.

18 Q Does ICE have any role in the processing or  
19 adjudication of naturalization applications?

20 A No.

21 Q There are no situations at all in which ICE  
22 is involved in the processing or adjudication of a

Page 76

1 naturalization application?

2 A I'm not aware of any.

3 Q If you'll look again to Exhibit Number 4,  
4 Mr. Aytes, the first page, second paragraph further  
5 down, the sentence beginning, "In the context of  
6 removal proceedings" -- do you see where I am?

7 A Yes.

8 Q It goes on to say, "ICE has determined that  
9 FBI fingerprint checks and Interagency Border  
10 Inspection Services checks are the required security  
11 checks for purposes of the applicable regulations."

12 A Uh-huh.

13 Q Do you know why ICE has determined that  
14 only fingerprint checks and IBIS checks are the  
15 required security checks for purposes of  
16 adjustment-to-LPR-status applications?

17 A I can't answer for ICE as to why they made  
18 that policy decision. But in fact, they also initiate  
19 the name check. Their policy is simply not to wait  
20 because they could rescind the status.

21 Q You said they initiate the name check?

22 A Yes.

Page 77

1 Q Do they do that only where an applicant is  
2 in removal proceedings?

3 A That's correct. That's the next sentence  
4 of the memorandum following what you just read.

5 Q Does CIS have any view as to why ICE  
6 determined that fingerprint checks and IBIS checks are  
7 the only required security checks for purposes of  
8 adjustment-to-LPR-status applications?

9 A Well, let me clarify. We're talking to our  
10 staff, and so there was a certain level of  
11 understanding that we expect of folks in -- the FBI --  
12 excuse me, ICE will initiate the IBIS check, the  
13 fingerprint check and the name check. All are  
14 required by their procedures. ICE will require that  
15 they have a definitive answer on the IBIS check and  
16 the fingerprint check before they proceed to move the  
17 case forward in the docket and notify the judge so the  
18 judge can make a final decision.

19 They do not wait for a final answer on the  
20 FBI name check because, as is described in the last  
21 sentence of this memorandum, their position has been  
22 that because permanent residence is not permanent



<p style="text-align: right;">Page 78</p> <p>1 because it can be readily taken away for cause, that  2 if they were to find any information as a result of  3 the name check that caused them to question the  4 person's eligibility for permanent residence that they  5 could initiate rescission or removal proceedings.  6 That is what the key preexisting  7 distinction was between the two agencies. They said,  8 "We can take this away if necessary." We said, "Well,  9 that may be so, but we're going to wait anyway." The  10 February 4, 2008 memo simply adjusted our procedures  11 in adjustment-of-status applications to come into  12 compliance with their preexisting procedures.  13 Q Was CIS required to come into compliance  14 with ICE procedures regarding adjustment-to-LPR-status  15 applications?  16 A No, we were not required to do so. The DHS  17 OIG pointed out the anomaly of the difference in the  18 two agencies' policies in that respect. We made a  19 decision that we were going to modify our policies  20 with regards to adjustment-of-status applications.  21 Q Can you turn to the second page of the  22 memo, please, Mr. Aytes?</p>	<p style="text-align: right;">Page 80</p> <p>1 FBI name check response before proceeding with  2 adjudication of an LPR -- of an adjustment-to-LPR-  3 status application?  4 A We continued to have some reservations with  5 regards to the ICE policy to initiate the check and  6 then move forward knowing that name checks were taking  7 some time if there was actually a record at the  8 Bureau. We felt that that six-month time frame was a  9 reasonable period to wait before we made a preliminary  10 decision, but that waiting more than six months  11 probably did not make sense given that we could  12 rescind the status.  13 Q So your testimony is that CIS chose the  14 180-day time period to wait for FBI name check  15 responses before adjudicating applications for  16 adjustment to LPR status because it regarded 180 days  17 as a reasonable period of time to wait; is that  18 correct?  19 A In the context of adjustment proceedings  20 where we could rescind the status fairly readily for  21 cause.  22 Q Is the answer yes, then?</p>
<p style="text-align: right;">Page 79</p> <p>1 A Yes, sir.  2 Q The paragraph at the top of the page about  3 six lines down, it reads, "Where the application is  4 otherwise approvable and the FBI name check request  5 has been pending for more than 180 days, the  6 adjudicator shall approve the I-485, I-601, I-687 or  7 I-698 and proceed with card issuance," is that  8 correct?  9 A That's correct.  10 Q And this is the page that is Bates numbered  11 CIS 006285; is that correct?  12 A Yes.  13 Q Why did you decide that 180 days was the  14 appropriate period to wait for an FBI name check  15 request for adjudicating the adjustment-to-LPR-status  16 applications?  17 MS. ONOZAWA: Objection to form. I just  18 disagree with the characterization of "you."  19 Mr. Aytes is speaking on behalf of the agency.  20 Q Let me rephrase my question, Mr. Aytes, in  21 light of that. Why did CIS decide on February 4, 2008  22 that 180 days was the appropriate time to wait for an</p>	<p style="text-align: right;">Page 81</p> <p>1 A Yeah, but I have to clarify because that's  2 the key distinction as to why the agency did not  3 implement this same policy change for naturalization.  4 Q Okay. So why don't you clarify that, then.  5 A In the context of adjustment of status,  6 while it's referred to as "permanent residence," it is  7 in fact not permanent. For cause based on either  8 additional information that the agency obtains about  9 your initial eligibility or predicated on actions that  10 occur after you become a permanent resident, the  11 agency can initiate either rescission and/or removal  12 proceedings as appropriate. And it's fairly -- can  13 fairly readily take away your permanent residence and  14 in fact remove you from the United States.  15 Naturalization is very, very different.  16 While there is a theoretical ability to revoke  17 naturalization, it is -- it is and should be so  18 difficult to do so that it is close to impossible.  19 And so if you were to implement the same policy that  20 we implemented for adjustments, what you would be  21 doing is you would be making an absolutely --  22 literally an absolutely final decision that you could</p>

<p style="text-align: right;">Page 82</p> <p>1 not revisit whereas in adjustment cases if we get  2 subsequent information we can do -- and it's fairly  3 routine to be able to review and undo that decision.  4 Q Let me ask you again about this 180-day  5 period that's referenced in this February 4, 2008  6 letter. You've testified that this 180-day waiting  7 period is reasonable given that it is possible to  8 rescind or revoke an adjustment to LPR status; is that  9 correct?  10 A Yes.  11 Q Are there any other reasons why CIS regards  12 the 180-day period -- waiting period as a reasonable  13 one for purposes of applications for adjustment to LPR  14 status?  15 A No.  16 Q It's the only reason?  17 A (Nodding head up and down.)  18 Q Why did the agency, then, decide that 180  19 days was the appropriate period?  20 A It's a question of balance, because even in  21 making this policy change there is an associated  22 cost -- we're going to track each and every case that</p>	<p style="text-align: right;">Page 84</p> <p>1 reasonable to move forward immediately if we were  2 otherwise prepared to adjudicate an application for  3 adjustment.  4 Q Are there any other reasons why the agency  5 believes that it is not appropriate to apply a 180-day  6 waiting period to applications for naturalization  7 other than the difficulties of revoking naturalization  8 once it's been granted?  9 A I would say that that was the predominant  10 consideration. There is also, however, the -- how  11 it's perceived by the general public. Naturalization,  12 the granting of citizenship in the United States, is  13 the most important benefit this government can convey.  14 You do not do so unless you are certain. And to adopt  15 a policy that, "Well, we're somewhat certain but still  16 somewhat unsure. We're going to proceed nonetheless,"  17 and then argue for an expanded ability to be able to  18 take that status back from someone we felt was  19 inappropriate, beyond the fact that it was -- we don't  20 have that kind of authority under the current  21 statutory and regulatory constructions.  22 Q Have any FBI name checks returned</p>
<p style="text-align: right;">Page 83</p> <p>1 we adjudicate without the FBI's final answer and  2 postaudit those cases until we get the FBI's final  3 answer and then review them.  4 So it was a question as to when is a  5 reasonable break point as to when their responses are  6 coming in in large portion, not for the entire  7 population, but in large portion, and what is a  8 reasonable break point to wait understanding that  9 obligation that we will impose on ourselves to  10 postaudit those cases.  11 Our preexisting policy, if I may --  12 Q Sure.  13 A -- was to always wait an adjustment  14 notwithstanding ICE's policy because we were issuing  15 people EADs that were valid for a year, they had  16 ongoing permission to remain in the United States, and  17 we were giving advanced parole documentation. So our  18 sense was there was no magical point in time. Once  19 you agree to come into -- that you want to adopt ICE's  20 position in this respect, it's reasonable to evaluate  21 at what point you want to move forward in time as  22 opposed to continuing to wait. We did not feel it was</p>	<p style="text-align: right;">Page 85</p> <p>1 derogatory information regarding an applicant for  2 adjustment to LPR status since the time this memo,  3 Exhibit 4, was issued on February 4, 2008?  4 MS. ONOZAWA: I object to that question to  5 the extent it calls for information that is  6 protected by the law enforcement privilege.  7 But you may answer to the extent that you  8 don't reveal that information.  9 A I don't personally know how many cases  10 where we have initiated a revocation or -- or  11 initiated removal proceedings by issuing a Notice of  12 Intent to Appear.  13 Typically, given the time frames associated  14 with getting a positive response from the FBI, we  15 would be at an early stage of reviewing those cases to  16 decide if removal proceedings were warranted. So it's  17 really too early to determine what that volume is  18 going to be. If we expected that that volume would be  19 zero, we would not have implemented the kind of  20 absolutely close controls over these cases until we  21 get the final answer from the FBI.  22 Q Has CIS move to rescind the LPR status of</p>

<p style="text-align: right;">Page 86</p> <p>1 any persons based on derogatory information returned 2 by the FBI since this February 4, 2008 memo was 3 issued? 4 A I think I just answered that. 5 Q And can you repeat your answer, then, 6 please? 7 A My answer was that this procedure was 8 implemented in February. Given the timelines to get 9 the final FBI response, to review that response and 10 make a decision as to whether or not to initiate 11 removal proceedings, the timelines are such that I 12 would doubt that we have done -- actually issued an 13 NTA in one of those cases. 14 Q But you're not sure, it's possible that may 15 in fact -- 16 A It's possible. I can't tell you 17 definitively that we haven't. 18 Q Have there been any discussions since 19 February 4, 2008 about the effectiveness of this new 20 LPR policy applying a 180-day waiting period to the 21 FBI name checks? 22 MS. ONOZAWA: I would direct the witness</p>	<p style="text-align: right;">Page 88</p> <p>1 Q Well, let me finish my question, please. 2 Did you testify that there were discussions between 3 CIS and members of Congress about extending the 4 February 2008 LPR change to naturalization 5 applications? 6 MS. ONOZAWA: Objection, assumes facts in 7 evidence. You haven't established that Mr. Aytes 8 personally has testified -- 9 MR. GHACHEM: I'm just asking him was that 10 his testimony -- 11 A I probably shouldn't have used the term 12 "discussions." There was a hearing. It was not on 13 the name checks. It was a couple of months ago. It 14 was on case processing issues. The issue of our 15 policy with regards to adjustment procedures came up. 16 There were at least one explicit question from the 17 subcommittee with regards to whether or not we were 18 prepared or even willing to consider extending this to 19 naturalization. And the question was framed -- you 20 can go back to the record -- by Representative King 21 and he was extraordinarily concerned that we might be 22 considering that kind of policy change.</p>
<p style="text-align: right;">Page 87</p> <p>1 not to answer to the extent it calls for 2 information regarding -- predecisional information 3 regarding the efficacy of this policy. 4 A Other than a lot of support from the 5 private sector and from organizations and individuals 6 who really appreciated this policy change, and other 7 than some concern on the Hill with respect as to 8 whether or not we were even going to entertain the 9 idea of extending this policy to naturalization, no, 10 there has not been -- again, this policy is relatively 11 new. We have not yet been able to determine the 12 volume of cases in which we're going to have to 13 initiate removal proceedings. Over time as the FBI 14 continues to reduce their processing times and their 15 associated backlogs, we'll be able to get a clear 16 sense as to how many cases where we will have to, 17 after granting permanent residence, initiate removal 18 proceedings. 19 Q You said there were discussions between CIS 20 and members of Congress about the possibility of 21 extending -- 22 A There was a hearing.</p>	<p style="text-align: right;">Page 89</p> <p>1 Q Did you testify at that hearing? 2 A Yes, I did. 3 Q And how did you answer Representative 4 King's concern or question? 5 A My answer was that the agency had no plans 6 to consider extending that policy to naturalization 7 because we did not have the ability to rescind that 8 status in the way that we did permanent residence. 9 Q Is it impossible to rescind a 10 naturalization status? 11 MS. ONOZAWA: Objection, vague, calls for 12 speculation. 13 Q Let me rephrase the question. Does CIS 14 have the ability to reverse a naturalization grant? 15 A It is in theory possible under the law. It 16 is in practice -- there is an exceedingly high 17 benchmark that the government has to reach in order to 18 be able to rescind naturalization, a far higher 19 benchmark than with regards to permanent residence. 20 Q Can you tell me what CIS's understanding of 21 that benchmark is? 22 A Let me put it this way: From our</p>

<p style="text-align: right;">Page 90</p> <p>1 perspective that benchmark is so high it would take an  2 extraordinary case where someone has -- there have  3 been a couple of instances, for example, of people who  4 were reportedly guards in Dachau, Auschwitz, those  5 kinds of places. And even in those instances where  6 there's been fairly definitive proof it's taken  7 decades to strip an individual of their citizenship.  8 It is an exceedingly lengthy process and the legal  9 benchmarks are extraordinarily high for the government  10 to be able to rescind United States citizenship.  11 Q Do you have responsibility for supervising  12 CIS denaturalization proceedings?  13 A Denaturalization proceedings are usually  14 handled by the Department of Justice, if I recall  15 correctly.  16 Q Does CIS have any role in those  17 proceedings?  18 A I'm sure we have a tangential role. I  19 couldn't specify exactly what that role is.  20 Q Does CIS know what is required to  21 denaturalize a person?  22 A CIS does. Could I tell you over the table?</p>	<p style="text-align: right;">Page 92</p> <p>1 that would occur if the FBI returns derogatory  2 information in connection with a naturalization  3 application?  4 A Yeah, we do these name checks for a reason.  5 We do them to search for information relevant to a  6 person's claim of eligibility for benefit. And so  7 we're going to take that information and we're going  8 to consider its relevance to their claim of  9 eligibility.  10 Q You testified earlier that naturalization  11 is the most important benefit that the United States  12 Government can provide; is that correct?  13 A I did.  14 Q Why do you believe that?  15 MS. ONOZAWA: Again, I object to the  16 question --  17 A Let's put that down as personal opinion.  18 Q Is that your belief or CIS's belief?  19 A That is my personal belief.  20 Q Okay. Why do you believe that?  21 A We are granting -- CIS grants a broad  22 variety of benefits, everything from extending</p>
<p style="text-align: right;">Page 91</p> <p>1 No.  2 Q Do you have any ideas about that --  3 A I think I've described it in a broad sense.  4 Other than that you'd have to go back to the legal  5 experts to -- for that -- for more specificity.  6 Q What would happen today if the FBI returned  7 derogatory information in response to a name check  8 request from the CIS in connection with an applicant  9 for adjustment to LPR status?  10 A We're going to evaluate that information  11 and determine whether or not -- determine its  12 relevance to eligibility and whether or not it  13 predates -- the information predates or postdates  14 adjustment -- the grant of adjustment, and whether or  15 not the initiation of removal proceedings are  16 appropriate if we granted adjustment. If we have not  17 granted adjustment, similarly we're going to go  18 through exactly the same process and the same kind of  19 review to determine its -- the impact of the  20 information on the determination of eligibility and  21 admissibility.  22 Q Are those the same sorts of discussions</p>	<p style="text-align: right;">Page 93</p> <p>1 someone's temporary stay in the United States to  2 letting them work here. We grant important benefits  3 like asylum, refugee status, permanent residence in  4 the United States. None of those convey the types of  5 rights, privileges and benefits that United States  6 citizenship conveys. That is the benefit that  7 literally vests someone in this country, makes them  8 equal to every other person in every respect.  9 Q Where does naturalization stand in terms of  10 priorities --  11 A That's what I'm talking about,  12 naturalization is -- in terms of -- in terms of  13 importance, from my personal opinion, is that  14 naturalization is the most important benefit that  15 USCIS conveys.  16 Q I'm asking now about the agency, about CIS.  17 Where does naturalization stand in the hierarchy of  18 priorities at CIS?  19 A It is a very high priority for CIS.  20 Q Is it the highest priority for CIS?  21 MS. ONOZAWA: Objection, vague.  22 Q You can answer that question.</p>

<p style="text-align: right;">Page 94</p> <p>1 A Is it the highest priority for CIS? No.</p> <p>2 There are certain rules and regulations that we have</p> <p>3 to adhere to with regards to time frames for certain</p> <p>4 applications. The processing of a determination --</p> <p>5 there are people in harm's way who we are adjudicating</p> <p>6 for refugee benefits, for example. Can I say that</p> <p>7 naturalization is more important than the time</p> <p>8 sensitivity associated with that refugee determination</p> <p>9 given that situation that that individual is in? No,</p> <p>10 I can't.</p> <p>11 That doesn't mean naturalization isn't an</p> <p>12 important benefit, but I have to weigh the</p> <p>13 circumstances that many of our applicants find</p> <p>14 themselves in. We have to weigh that a person who</p> <p>15 applies for adjustment of status is entitled to</p> <p>16 interim benefits within 90 days if we're not able to</p> <p>17 process their associated applications, and so that</p> <p>18 makes us prioritize their associated applications.</p> <p>19 Other than those things, yes,</p> <p>20 naturalization is considered, you know, probably the</p> <p>21 most important benefit in terms of our priorities.</p> <p>22 And I think we've made that pretty clear through the</p>	<p style="text-align: right;">Page 96</p> <p>1 AFTERNOON SESSION</p> <p>2 MR. GHACHEM: Will you mark this as Aytes</p> <p>3 5, please?</p> <p>4 (Exhibit 5 was marked for identification</p> <p>5 and attached to the deposition transcript.)</p> <p>6 MS. ONOZAWA: Sorry, just a question about</p> <p>7 Aytes 5. Just again I think this is -- to the</p> <p>8 extent the questioning is going into any</p> <p>9 comparative analyses regarding the value of the</p> <p>10 name check, I would object as that is a topic</p> <p>11 that's been designated for Greg Smith.</p> <p>12 MR. GHACHEM: I think you need to wait,</p> <p>13 Tomoko, to see what I'm actually going to --</p> <p>14 you've objected extensively, which, you know, is</p> <p>15 your right, but you really need to hear my</p> <p>16 questions before you object to the scope.</p> <p>17 MS. ONOZAWA: Fair enough.</p> <p>18 CONTINUED EXAMINATION OF MICHAEL L. AYTES</p> <p>19 BY MR. GHACHEM:</p> <p>20 Q All right. So, Mr. Aytes, I'm handing you</p> <p>21 a document that has been marked as Aytes Exhibit</p> <p>22 Number 5. The starting Bates number on the first page</p>
<p style="text-align: right;">Page 95</p> <p>1 documentation, the strategy that we've laid out, the</p> <p>2 shifting of resources from adjustment interviews to</p> <p>3 naturalization interviews in field offices and the</p> <p>4 other -- the allocations of overtime and the other</p> <p>5 things that we have done to try and react to the</p> <p>6 additional volume of applications that we received</p> <p>7 last year.</p> <p>8 MR. GHACHEM: Okay. I propose that we</p> <p>9 break for lunch here, Tomoko, if you're okay with</p> <p>10 that.</p> <p>11 MS. ONOZAWA: Okay.</p> <p>12 (Lunch recess taken.)</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p style="text-align: right;">Page 97</p> <p>1 is CIS 004401; is that correct?</p> <p>2 A Yes.</p> <p>3 Q And this document is entitled, "FBI Name</p> <p>4 Check Comparative Analysis," dated August 2, 2006; is</p> <p>5 that right?</p> <p>6 A Yes.</p> <p>7 Q Did CIS produce this document?</p> <p>8 A Yes.</p> <p>9 Q Do you recognize it?</p> <p>10 A I've seen it.</p> <p>11 Q Okay. What is your understanding of what</p> <p>12 this document is about?</p> <p>13 A This was just one of a number of attempts</p> <p>14 to try and look at the name check and look at side by</p> <p>15 side with other background checks that we conduct to</p> <p>16 attempt to identify, you know, the incidence of</p> <p>17 information that we get from the name check as opposed</p> <p>18 to those other kinds of searches.</p> <p>19 Q Are there any other studies comparing the</p> <p>20 various background checks that CIS requests prior to</p> <p>21 August 2, 2006 that you are aware of?</p> <p>22 A Prior to?</p>



<p style="text-align: right;">Page 98</p> <p>1 MS. ONOZAWA: Again, I -- I have to object.</p> <p>2 I'm not entirely sure why this isn't outside the</p> <p>3 scope of his 30(b)(6) -- designated 30(b)(6)</p> <p>4 testimony.</p> <p>5 MR. GHACHEM: Well, it is -- it is</p> <p>6 apparently outside the scope of Mr. Collette's</p> <p>7 testimony whether or not there are any comparative</p> <p>8 analyses of the FBI name check postdating 2003.</p> <p>9 So you're limiting us in your other deposition.</p> <p>10 MS. ONOZAWA: That's not correct.</p> <p>11 Mr. Smith has expressly been designated for this</p> <p>12 purpose and his deposition is being taken</p> <p>13 tomorrow.</p> <p>14 MR. GHACHEM: Sorry, Mr. Collette.</p> <p>15 Mr. Collette.</p> <p>16 MS. ONOZAWA: That's correct. And as I</p> <p>17 understand it, Mr. Smith was expressly designated</p> <p>18 to testify as to analyses as to the purpose, use</p> <p>19 and value of the FBI name checks.</p> <p>20 MR. GHACHEM: I'm only asking whether or</p> <p>21 not they exist. So I think he can answer that</p> <p>22 question.</p>	<p style="text-align: right;">Page 100</p> <p>1 such delays, remedial efforts, if any, to address</p> <p>2 delays and/or backlogs in the processing of</p> <p>3 naturalization applications, and any analyses</p> <p>4 performed regarding such delays, backlogs and/or</p> <p>5 remedial efforts?</p> <p>6 MS. ONOZAWA: But this comparative analysis</p> <p>7 of the FBI name check, I just don't see how it</p> <p>8 relates to delays, backlogs and/or remedial</p> <p>9 efforts.</p> <p>10 MR. GHACHEM: Well, it's an analysis that</p> <p>11 is regarding delays, backlogs and/or remedial</p> <p>12 efforts insofar as it discusses --</p> <p>13 MS. ONOZAWA: I disagree. Again, I insist</p> <p>14 that --</p> <p>15 MR. GHACHEM: Okay. Let's --</p> <p>16 BY MR. GHACHEM:</p> <p>17 Q I'm going to redirect the line of</p> <p>18 questioning. We'll return to this later, Mr. Aytes.</p> <p>19 This is not productive.</p> <p>20 Mr. Aytes, do you know whether --</p> <p>21 MR. GHACHEM: So are you instructing him</p> <p>22 not to answer that question.</p>
<p style="text-align: right;">Page 99</p> <p>1 MS. ONOZAWA: No, I actually believe that</p> <p>2 Mr. Smith is the appropriate 30(b)(6) designee for</p> <p>3 this line of questioning. And I will refer you to</p> <p>4 topic 7E, which has been designated CIS -- and</p> <p>5 there's a reference to CIS 4401 to 4413, which has</p> <p>6 been marked already as Aytes Exhibit 5.</p> <p>7 MR. GHACHEM: All right. Well, I don't</p> <p>8 intend to go into the substance of this report. I</p> <p>9 do want to ask him whether or not there are other</p> <p>10 studies that are in existence and that's the</p> <p>11 extent of my questioning on this topic.</p> <p>12 MS. ONOZAWA: And again, I think that's a</p> <p>13 question that's appropriately directed to</p> <p>14 Mr. Smith. To the extent you can relate this to</p> <p>15 any of the other topics that have been expressly</p> <p>16 designated for Mr. Aytes -- I just don't see why</p> <p>17 Mr. Aytes would be the agency representative who</p> <p>18 would be answering these questions.</p> <p>19 MR. GHACHEM: All right. How about topic</p> <p>20 number 3, from 2000 to the present day causes of</p> <p>21 delays and/or backlogs in the processing of</p> <p>22 naturalization applications, the harm caused by</p>	<p style="text-align: right;">Page 101</p> <p>1 MS. ONOZAWA: What question was that?</p> <p>2 MR. GHACHEM: My previous question, which</p> <p>3 was, "Are there any analyses prior to August 2,</p> <p>4 2006 of the comparative value of the name check</p> <p>5 relative to other background checks that you're</p> <p>6 aware of?"</p> <p>7 MS. ONOZAWA: That's correct. I direct him</p> <p>8 not to answer.</p> <p>9 BY MR. GHACHEM:</p> <p>10 Q All right. So, Mr. Aytes, do you know</p> <p>11 whether the FBI has begun to look at the contents of</p> <p>12 files relating to applicants with derogatory</p> <p>13 information who have applied for naturalization as far</p> <p>14 back as 2003?</p> <p>15 A I'm sorry, I don't understand.</p> <p>16 Q Is it true that CIS is still awaiting from</p> <p>17 FBI further information regarding applicants for</p> <p>18 naturalization who applied as long ago as 2003 and</p> <p>19 with respect to whom the FBI has indicated that there</p> <p>20 may be derogatory information?</p> <p>21 A At the present time I don't believe that's</p> <p>22 any longer the case. The FBI had a plan funded by us</p>

Page 102

1 with money appropriated by Congress for that purpose  
 2 to reduce and eliminate their backlog. The initial  
 3 benchmark was to eliminate all cases that were over  
 4 four years old. They have substantively done that. I  
 5 think there are a couple of cases where the systems  
 6 are still being reconciled to make sure that the  
 7 results feed into our system. Their next benchmark  
 8 was to complete cases I think by the end of -- I think  
 9 it was the end of June, all cases over three years  
 10 old. And again, our data shows that they have  
 11 substantively met that benchmark. So I don't believe  
 12 that there are any cases that are older than 2003  
 13 where we are still waiting a final answer from the  
 14 Bureau.

15 Q But there are -- but there are some cases  
 16 from 2003 where you're awaiting the final answer from  
 17 the Bureau?

18 A There are some cases from 2003 -- or there  
 19 may be from 2003 where they have completed their  
 20 research and it's being fed into our system, but based  
 21 on the technology that's used, the tapes that's used,  
 22 we have to reconcile that on, you know, a case-by-case

Page 103

1 basis. And so I think they're down into a handful of  
 2 cases where the FBI has completed their work but the  
 3 results are not yet populated into our system.

4 Q Is CIS still in the process of reviewing  
 5 letterhead memoranda from the FBI that summarize the  
 6 results of name checks that were returned to CIS as  
 7 far back as 2002?

8 A We do have results from the FBI. The age  
 9 of the associated case I can't tell you because our  
 10 case management systems don't track each case by their  
 11 age. It's possible that there may be a case from 2002  
 12 where we have received the FBI's final answer and  
 13 based on that information have additional work to do  
 14 before we make a final decision.

15 Q Are you aware, Mr. Aytes, that in 1985 the  
 16 FBI and CIS entered into a Memorandum of Understanding  
 17 regarding the parameters of the name checks that FBI  
 18 would perform for CIS?

19 A I'm aware of that.

20 Q Did CIS and the FBI enter into any other  
 21 agreements between 1985 and 2002 regarding the  
 22 parameters of the name check analyses that FBI

Page 104

1 performed for CIS?

2 A I'm not aware of any.

3 Q Okay. So the only ones that you're aware  
 4 of are the 1985 Memorandum of Understanding and -- are  
 5 there any others besides the 1985 Memorandum of  
 6 Understanding?

7 A There was another document that you  
 8 referenced that alluded to changes in the systems and  
 9 in the screening and in the search criteria in 2002,  
 10 and then there have been a more recent MOU that has  
 11 been signed with the FBI that was part of our  
 12 releasing additional funds to the Bureau to add the  
 13 capacity necessary to work off their backlog.

14 Q What's the date of that last memo that you  
 15 referred to, the more recent one?

16 A I don't recall. It was -- I think it was  
 17 late 2007.

18 MR. GHACHEM: Have you produced that,  
 19 Tomoko, do you know, that 2007 MOU?

20 MS. ONOZAWA: We may have. I couldn't tell  
 21 you off the top of my head.

22 MR. GHACHEM: Okay. Could you check and

Page 105

1 see, if that hasn't been produced, whether you  
 2 could produce that to us?

3 MS. ONOZAWA: It would have to be sometime  
 4 tomorrow. We've produced 14,000 pages of  
 5 documents.

6 A Late 2007, early 2008. It's an MOU between  
 7 the FBI and CIS that is summarized in the FBI's  
 8 backlog elimination plan that was provided to the  
 9 Hill.

10 Q Does that 2007 Memorandum of Understanding  
 11 provide for any changes in the 2002 rule changes? Let  
 12 me rephrase the question. That was slightly  
 13 confusing.

14 Does that 2007 Memorandum of Understanding  
 15 between the FBI and CIS have any provisions relating  
 16 to whether or not CIS must await a definitive response  
 17 from FBI regarding any name checks that it submitted?

18 A No, because that wasn't part of -- I don't  
 19 believe at any point that was part of a stipulation  
 20 between us and the Bureau. That was a decision made  
 21 by CIS based on the reasons why we were requesting the  
 22 name check and other background checks in the first



<p style="text-align: right;">Page 106</p> <p>1 place.</p> <p>2 Q Does the 2007 Memorandum of Understanding</p> <p>3 have any provisions relating to whether or not CIS</p> <p>4 requires the FBI to search both its main and reference</p> <p>5 files in response to name check requests from CIS?</p> <p>6 A There have been some refinements of the</p> <p>7 search criteria. I don't know that those refinements</p> <p>8 are as broad as you just described. You have to</p> <p>9 remember that the FBI databases and their records</p> <p>10 include a wide variety of things, including EEO</p> <p>11 complaints about FBI employees, people who have been</p> <p>12 trained by the FBI. So, you know, there are things</p> <p>13 that you want to filter out, records that you don't</p> <p>14 want to search. I don't know whether the changes that</p> <p>15 have been made have been as broad as to go back and</p> <p>16 eliminate searching reference files in large part or</p> <p>17 in whole. Greg could probably answer that off the top</p> <p>18 of his head, Greg Smith. I couldn't without going</p> <p>19 back and looking in the documentation.</p> <p>20 (Discussion off the record.)</p> <p>21 MR. GHACHEM: We have the Memorandum of</p> <p>22 Understanding.</p>	<p style="text-align: right;">Page 108</p> <p>1 seen it at some point, but I don't recognize it</p> <p>2 quickly.</p> <p>3 Q Do you see that on the first page it says,</p> <p>4 "Department of Justice," and then below that, "G-325</p> <p>5 Name Check Business Case Analysis Feasibility Study"?</p> <p>6 A Uh-huh.</p> <p>7 Q What is a G-325 name check?</p> <p>8 A G-325 was a prior process with regards to</p> <p>9 conducting name checks with the Bureau and with some</p> <p>10 other agencies, a preexisting paper process. The</p> <p>11 G-325 was a biographic form that an individual would</p> <p>12 fill out, submit with their application, and copies of</p> <p>13 it would actually be on paper submitted to other</p> <p>14 agencies to initiate a search.</p> <p>15 Q Okay. So -- so in other words, it's the --</p> <p>16 it's what we understand as the FBI name check in</p> <p>17 connection with naturalization applications; is that</p> <p>18 right?</p> <p>19 A Yes. Iteratively, yes.</p> <p>20 Q Is this document, Aytes Exhibit Number 6,</p> <p>21 an INS study?</p> <p>22 A Seems to be.</p>
<p style="text-align: right;">Page 107</p> <p>1 THE WITNESS: I would have been surprised</p> <p>2 if you hadn't.</p> <p>3 MS. ONOZAWA: What's the date?</p> <p>4 MR. GHACHEM: It's attached to an e-mail</p> <p>5 dated October 16, 2007. It's CIS Smith.e 02408</p> <p>6 and 09.</p> <p>7 MS. ONOZAWA: Okay. Thanks. Can you say</p> <p>8 the Bates number again? I'm sorry.</p> <p>9 MR. GHACHEM: It is CIS Smith 02408 to</p> <p>10 02409.</p> <p>11 MS. ONOZAWA: Okay.</p> <p>12 MR. GHACHEM: I'd like to have this</p> <p>13 document marked as Aytes Number 6.</p> <p>14 (Exhibit 6 was marked for identification</p> <p>15 and attached to the deposition transcript.)</p> <p>16 BY MR. GHACHEM:</p> <p>17 Q Mr. Aytes, I'm handing you a document that</p> <p>18 is now designated Aytes Exhibit 6. It has the Bates</p> <p>19 number beginning CIS 000987; is that correct?</p> <p>20 A Yes.</p> <p>21 Q Do you recognize this document?</p> <p>22 A Not off the top of my head. I've probably</p>	<p style="text-align: right;">Page 109</p> <p>1 Q Okay. Could you take a look at page 1 of</p> <p>2 the study, which is CIS 000988 Bates number?</p> <p>3 A Uh-huh.</p> <p>4 Q See at the very bottom of that page,</p> <p>5 Mr. Aytes, it says, "INS established the name check</p> <p>6 process to request background information from FBI and</p> <p>7 CIA"? Do you see that?</p> <p>8 A Uh-huh.</p> <p>9 Q And then at the top of page 2 do you see</p> <p>10 that it reads, "While name checks are not specifically</p> <p>11 required by Congressional legislation, there are</p> <p>12 several statutory sources related to INS's</p> <p>13 responsibility to conduct background investigations"?</p> <p>14 A Uh-huh.</p> <p>15 Q Can you tell me what your understanding of</p> <p>16 that sentence is, the sentence beginning, "While name</p> <p>17 checks are not specifically required"?</p> <p>18 A There is no -- my recollection is there is</p> <p>19 no explicit reference to the types of background</p> <p>20 checks that we are required to conduct by legislation.</p> <p>21 We are required to make determinations of eligibility</p> <p>22 for the specific benefits consistent with the</p>

<p style="text-align: right;">Page 110</p> <p>1 statutory eligibility criteria that Congress 2 established for that particular benefit. 3 And so what they're talking about here is 4 the underlying bases upon which the agency has decided 5 that the name checks are relevant to its determination 6 of eligibility for these applications. 7 Q Could you turn, please, to page 12 of the 8 study, Mr. Aytes, which is Bates number CIS 000999? 9 A Uh-huh. 10 Q Do you see that at the top of this page 11 there is a proposed alternative to the name check 12 proposing that INS eliminate G-325 functionality in 13 current systems? 14 A Uh-huh. 15 Q Can you explain to me what that means, 16 eliminate G-325 functionality in current systems? 17 A What that would mean is that would 18 eliminate the associated tracking mechanisms, because 19 this alternative suggests eliminating the entire name 20 check process. 21 Q Do you know why INS proposed as an 22 alternative eliminating the name check process in this</p>	<p style="text-align: right;">Page 112</p> <p>1 this the further line of questioning to the extent 2 you're straying into topic 7E, analysis of the 3 value of FBI name checks in adjudicating 4 naturalization applications, as a topic that has 5 been expressly designated for Greg Smith tomorrow. 6 MR. GHACHEM: Okay. This is a document 7 that I'd like to have marked as Aytes Exhibit 7 8 (Exhibit 7 was marked for identification 9 and attached to the deposition transcript.) 10 BY MR. GHACHEM: 11 Q Mr. Aytes, if you'd turn to the first page 12 of this document, it reads at the top, "A blueprint 13 for the New Naturalization Process," and it's dated 14 December 8, 1998. 15 A Uh-huh. 16 MS. ONOZAWA: Objection. You haven't 17 established that Mr. Aytes is actually familiar 18 with this document. 19 MR. GHACHEM: Well, I will ask him that in 20 just a minute, but I'm just asking if he 21 recognizes the first page. 22 Q Do you recognize this document, Mr. Aytes?</p>
<p style="text-align: right;">Page 111</p> <p>1 April 2001 study? 2 A Let me clarify. INS, my understanding, did 3 not propose as an alternative. INS considered a 4 variety of alternatives. One of the alternatives it 5 considered in this study was whether or not the G-325 6 should be eliminated. 7 Q On that same page, 12, Mr. Aytes, if you 8 look in the paragraph that's titled "Description," do 9 you see about three lines down that it reads, "First, 10 the INS already garners background information through 11 applicant interviews and the fingerprint check 12 process"? 13 A Uh-huh. 14 Q "Thus the elimination of the name check 15 process may not hinder INS from satisfying statutory 16 requirements"? 17 A Yeah, it discusses the possible arguments 18 for eliminating the name check. It doesn't make 19 definitive determinations, for example, that that's a 20 fact. It discusses the rationales for an alternative 21 to potentially eliminate the name check. 22 MS. ONOZAWA: And again, I would object</p>	<p style="text-align: right;">Page 113</p> <p>1 A We had a number of documents that were 2 generated by PricewaterhouseCoopers. Again, I'm 3 not -- off the top of my head don't recall this one, 4 but we had PricewaterhouseCoopers do a number of 5 studies relating to possible alternatives for changes 6 in the naturalization process. 7 Q Okay. Would you like to take a minute to 8 look through this and see if it refreshes your 9 recollection of this particular Pricewaterhouse study? 10 A Go ahead and ask your question, then I'll 11 try and catch up. 12 Q Okay. Is it your understanding that this 13 study by PricewaterhouseCoopers was part of an effort 14 to remedy delays in the naturalization application 15 processing situation at INS? 16 A It was actually broader than that. The 17 agency was looking at how it could reengineer the 18 process to improve the consistency, improve the 19 quality of the decision-making process, customer 20 service surrounding the naturalization process, as 21 well as ideally be able to reduce processing times. 22 Q Can you turn to page 3 of the document,</p>

Page 114

1 which is CIS 000120?

2 A Yes.

3 Q Do you see that at about the middle of the  
4 page, the end of the second paragraph there, it  
5 states, "Current INS policy specifies that if no FBI  
6 response is received after 45 days, the assumption is  
7 made that there are no matches"?

8 A Second paragraph?

9 Q The end of the second paragraph --

10 A Oh, okay.

11 Q -- on page 3. It's the last sentence  
12 there. "Current INS policy" --

13 A Uh-huh. So apparently that policy was in  
14 place at that time.

15 Q Okay. When you say "that policy," just to  
16 clarify, you mean the policy whereby INS did not  
17 require completion of an FBI name check prior to  
18 adjudicating a naturalization application?

19 A No, I'm sorry, I wouldn't describe it that  
20 way. What we talked about earlier was that the agency  
21 had a policy that understood that the FBI would  
22 complete its processing within a given period of time,

Page 115

1 and thus we would receive any record response within  
2 that period of time. And so we were free, receiving  
3 no response within that time frame, to proceed  
4 assuming that there was no record. It was -- that was  
5 very different than deciding to proceed consciously  
6 knowing that the name check was still pending.

7 In essence our understanding up until, you  
8 know, a few years ago was that the FBI was keeping up  
9 with these cases. It was very similar to the  
10 situation with fingerprints that we had until the mid  
11 '90s. And then when we found out that they were not  
12 able to keep up, we had to change our policy, because  
13 our policy wasn't just to initiate and then proceed,  
14 our policy was that we would get an answer within that  
15 time frame of anything that was substantive, and if we  
16 didn't get an answer within that time frame our  
17 assumption was there was no record.

18 Q What was the basis of that assumption?

19 A My understanding, it was based on  
20 discussions with the FBI about their time frames at  
21 those points in time.

22 Q Is it possible that after waiting 45 days

Page 116

1 and proceeding with an adjudication of a  
2 naturalization application that the FBI would  
3 subsequently return derogatory information in response  
4 to a CIS name check request?

5 A It's possible. I think to the extent to  
6 which that happened it would have caused the agency to  
7 question its policy.

8 Q But as of the date of this study, which is  
9 December 8, 1998, is it correct to say that it was the  
10 policy of INS that it was not required to wait more  
11 than 45 days for an FBI name check response prior to  
12 proceeding with adjudication of a naturalization  
13 application?

14 MS. ONOZAWA: Objection, vague.

15 A It was the policy of the agency to assume  
16 at the 45-day mark that the FBI was done and that we  
17 would have -- if we have received no response that the  
18 response was negative. Because the focus was on  
19 tracking those responses that were positive. It was  
20 not that we would move forward based on whether -- you  
21 know, not caring whether or not the name check process  
22 was completed. It was based on assuming that their

Page 117

1 process had been completed within that time frame.

2 Q Did the agency consider any risks to  
3 national security that were associated with proceeding  
4 with adjudication of a naturalization application  
5 after 45 days without receiving an FBI response?

6 A Based on the assumption --

7 MS. ONOZAWA: Objection. I object to that  
8 question to the extent that it calls for  
9 recommendations, proposals and subjective  
10 documents that reflect predecisional information.

11 To the extent you can answer, you can.

12 A With both the fingerprint check and  
13 subsequently the name check, the agency, as it  
14 realized operational -- the operational situation  
15 within the Bureau, moved from a default of assuming  
16 that if we didn't get a response -- because this was a  
17 paper process largely -- that if we didn't get a  
18 response within a time frame that we were free to  
19 proceed because their answer was negative, because we  
20 only cared about positive responses and we only  
21 tracked positive responses, to moving to a definitive  
22 tracking of each name check and not moving forward on

<p style="text-align: right;">Page 118</p> <p>1 the case until we got an answer, whether the answer 2 was negative or positive. Because we were finding 3 that their processing time had elongated and we could 4 no longer rely on assumption that if we didn't hear 5 within a certain time frame that they were done and 6 the answer was negative.</p> <p>7 Q Was it CIS's view at the time that the FBI 8 was taking an unreasonable amount of time to return 9 information in response to a name check request at 10 this time, 1998?</p> <p>11 A I don't believe at this time. Again, my 12 understanding of the discussions that were -- again, 13 it's my understanding because I wasn't really involved 14 in this at the time -- was that, you know, the 15 decision to move to a definitive response was an 16 inventory issue to, one, make sure the positive 17 responses were interfiled and, two, because we were 18 starting to question whether the FBI's processing time 19 would give us answers within the specified period.</p> <p>20 Q Can you turn to page 5, please, of this 21 document, Mr. Aytes?</p> <p>22 A Uh-huh.</p>	<p style="text-align: right;">Page 120</p> <p>1 the extent that it calls for a plan that has not 2 been implemented.</p> <p>3 A I'd have to go back and look at -- you 4 know, again, this was a consultant's set of 5 recommendations, that they were looking at a variety 6 of things for us. There may have been within one of 7 those documents an overarching plan that would have 8 implemented that change. Certainly we implemented 9 that change with respect to naturalization in May of 10 2006.</p> <p>11 Q When you say "that change" what do you 12 mean?</p> <p>13 A Just what it says here, mandating a 14 definitive response prior to interview.</p> <p>15 Q Oh, prior to interview, yes.</p> <p>16 (Exhibit 8 was marked for identification 17 and attached to the deposition transcript.)</p> <p>18 BY MR. GHACHEM:</p> <p>19 Q Mr. Aytes, I'm handing you a document 20 that's marked as Aytes Exhibit 8. Do you recognize 21 this document?</p> <p>22 A Yes, I do.</p>
<p style="text-align: right;">Page 119</p> <p>1 Q Do you see under the paragraph that's 2 entitled "System Capabilities" that it states, 3 "Recently plans were made to give CLAIMS4 the 4 capability to read FBI response tapes and note in each 5 applicant's record if his or her response is an NR or 6 IP"?</p> <p>7 A Uh-huh.</p> <p>8 Q What is an NR or an IP?</p> <p>9 A NR is no record. IP, I believe, stands for 10 indices popular, which means that they may have 11 record.</p> <p>12 Q Okay. The paragraph, then, continues, 13 "While this is a considerable first step, it does not 14 address the ultimate plan of mandating a definitive 15 response prior to interview." Do you see that it says 16 that?</p> <p>17 A Uh-huh.</p> <p>18 Q Did CIS have at this time an ultimate plan 19 of mandating a definitive response prior to 20 naturalization interviews?</p> <p>21 A I'd have to go --</p> <p>22 MS. ONOZAWA: I object to the question to</p>	<p style="text-align: right;">Page 121</p> <p>1 Q What is this document?</p> <p>2 A This is the memo I was just alluding to 3 where we implemented a change in scheduling to not 4 schedule an naturalization case for an interview until 5 we had the final answer from the FBI.</p> <p>6 Q Did you draft -- did you draft this 7 memorandum?</p> <p>8 A I signed the memorandum. I may have 9 contributed to the drafting of the memorandum. I 10 don't know that I wrote the whole thing myself.</p> <p>11 Q Who would have written it -- or who did 12 write it?</p> <p>13 A Just like any kind of document that goes 14 through a large organization, there are a lot of folks 15 who contribute to it. Who the original drafter was I 16 couldn't tell you. It might have been me. There are 17 times when I will draft something like this myself.</p> <p>18 It may have been someone in our policy group in 19 naturalization field operations. Would have been done 20 in consort with our folks in counsel and gone through 21 a whole review process before it was issued.</p> <p>22 Q Am I correct that this memo announced a new</p>

<p style="text-align: right;">Page 122</p> <p>1 requirement that CIS would not schedule naturalization 2 interviews prior to receiving a definitive result on 3 the FBI name check? 4 A On naturalization cases, yes. 5 Q Okay. Do you see in the first paragraph of 6 the letter, Mr. Aytes, that it reads about four lines 7 down, "For purposes of judicial economy, we will 8 promptly cease even to schedule any naturalization 9 interviews until all background checks have been 10 completed in a particular case"? 11 A Uh-huh. 12 Q Why did CIS announce that it would cease 13 even to schedule any naturalization interviews until 14 all background checks have been completed in a 15 particular case? 16 A We made this decision -- we had previously 17 had substantial backlogs. Backlogs in naturalization 18 are not rare, even though the agency up until the last 19 few years, hasn't had even goals that were set in 20 terms of processing times. 21 As we were successful in our backlog 22 elimination effort to significantly reduce our backlog</p>	<p style="text-align: right;">Page 124</p> <p>1 (Discussion off the record.) 2 BY MR. GHACHEM: 3 Q Mr. Aytes, are you familiar with the term 4 "CLAIMS4"? 5 A Yes. CLAIMS4 is a case processing system. 6 Q Is that a computer system? 7 A Yes. 8 Q Is it -- is it software that is used on CIS 9 computer systems? 10 A Yes, it is. 11 Q What kinds of applications is it used for? 12 A Primarily naturalization. 13 Q Any others? 14 A I think it supports the processing of a 15 couple of other citizenship-related applications. 16 Q Does it support adjustment-to-LPR-status 17 applications? 18 A No, it does not. 19 Q What does CIS do when it receives a 20 naturalization application that is defective in some 21 way or missing information? 22 A Depends on the nature of the defect. We</p>
<p style="text-align: right;">Page 123</p> <p>1 of naturalization cases, we were, by definition, 2 getting the cases more quickly. The greater speed 3 with which we were processing cases was creating a 4 greater disconnect with the FBI's processing times. 5 And so it was creating a greater risk that we would 6 conduct an interview not knowing what the FBI might 7 have had in its databases and creating then the 8 greater risk that someone would then argue under the 9 statute that if 120 had lapsed after our interview 10 that a court should assume jurisdiction of the case. 11 Q Are there any other reasons why CIS 12 announced in April of 2006 that it would promptly 13 cease even to schedule any naturalization interviews 14 until all background checks were completed in a 15 particular case? 16 A Not that I can recall. And we took care to 17 let our field leadership and employees know why we 18 were making this change in this memo. 19 MR. GHACHEM: Can we take a quick break, 20 Tomoko, about five minutes? 21 MS. ONOZAWA: Sure. 22 MR. GHACHEM: Thanks.</p>	<p style="text-align: right;">Page 125</p> <p>1 have certain standards for accepting an application. 2 Has to be completed, for example, has to be signed, 3 has to have the proper fee or a request for a fee 4 waiver. If it meets those basic criteria, it's 5 receipted and then we'll deal with any substantive 6 questions and issues through the review of the 7 application, potentially through a request for 8 evidence or information, or -- that's done either 9 prior to the interview or at or subsequent to an 10 interview. 11 Q If an application is missing the required 12 fee, the check in payment of the application fee, 13 would that fact be registered on CLAIMS4? 14 A I believe so, just as it is in CLAIMS3, 15 which is the case processing system for most other 16 applications. We track -- I believe the system tracks 17 rejections as well as receipted cases. 18 Q If an applicant submits an application with 19 a check that later bounces, would that fact be 20 registered on CLAIMS4? 21 A I believe so, but that's done after the 22 fact because the check bounces after we've receipted</p>



Page 126

1 the application. And so our action has to be  
2 different than -- it's not a typical rejection. We  
3 have to go back and ask the person to make good the  
4 check plus the penalty fee.

5 Q And after the applicant -- does CIS require  
6 the applicant to submit a new check when the first  
7 check has bounced?

8 A Yes. And I think that there are some other  
9 conditions with -- if it's a check.

10 Q Okay. And that information -- when I say  
11 "that information" I mean the information that the  
12 check has bounced the first time -- that information  
13 will be reflected on the CLAIMS4 system for that  
14 applicant?

15 A I believe so. That's my own understanding.

16 Q If an applicant submits an N-400  
17 application that is missing answers to certain  
18 questions, will that information be reflected on the  
19 CLAIMS4 system for that applicant?

20 A Which is missing, you mean?

21 Q Will the CLAIMS4 system tell you that a  
22 particular application was missing answers to certain

Page 127

1 questions on the N-400 application?

2 A No, because data entry is not that  
3 exhaustive. It doesn't enter every piece of data that  
4 the applicant submitted with the application. So  
5 typically that'll be caught manually as the  
6 application is reviewed.

7 Q And is it caught manually as the -- is the  
8 absence of certain answers to questions on the N-400  
9 form caught manually by CIS staff?

10 A Yes, and dealt with either prior to the  
11 interview or during the interview with the applicant.

12 Q And when CIS staff notice that answers to  
13 certain questions on the N-400 form are missing, do  
14 they register that fact on the CLAIMS4 system?

15 A I don't believe so. Don't know.

16 Q So how, then, does CIS notify applicants  
17 that their applications for naturalization are  
18 incomplete when those applications are missing --

19 A You mean after receipt?

20 Q After receipt, yes.

21 A One, we may do it across the table in an  
22 interview, or we may do it through a notice that we

Page 128

1 send the applicant. And that's one of the reasons why  
2 we attempt to look at the application to make sure  
3 that, you know, the basic information is there,  
4 because it becomes a little bit more problematic in a  
5 mail process to communicate with someone, "You didn't  
6 answer this question. We need the answer to that  
7 question," or, you know, the associated information.  
8 So in naturalization instances we interview most of  
9 those folks. Most of those issues are dealt with in  
10 the interview.

11 Q So is it correct, then, to say that CIS  
12 does not require answers to every question on the  
13 N-400 form before it will schedule an interview with a  
14 naturalization applicant?

15 A I believe so.

16 Q Are there certain questions on the N-400  
17 form that absolutely must be answered prior to an  
18 applicant's receiving an interview?

19 A I'm sorry, I can't tell you that. I don't  
20 know. I'd have to go back and look at the NQP and the  
21 associated procedures with respect to naturalization.

22 Q Is it true that CIS will sometimes grant a

Page 129

1 naturalization application even though there may be  
2 some answers missing on the N-400 form?

3 A We would have verbally confirmed the  
4 appropriate answers to that application during -- or  
5 that question in the context of the interview.

6 Q When does CIS schedule the biometrics  
7 appointment for a naturalization applicant?

8 A That is triggered after the receipt of the  
9 application and by the receipt of the application.

10 Q What happens if a naturalization applicant  
11 does not appear at the biometrics appointment?

12 A It could be deemed abandonment of their  
13 application. We may send them a second notice or they  
14 may have communicated with us and asked that their  
15 case be rescheduled.

16 Q If an naturalization applicant misses a  
17 biometrics appointment, will that fact be registered  
18 on the CLAIMS4 system?

19 A I believe that that is registered. Again,  
20 we'd have to ask someone who uses the system daily  
21 those kinds of questions.

22 Q Other than submitting the N-400 application

Page 130

1 and showing up for the biometrics appointment, is  
2 there anything else that a naturalization applicant  
3 must do prior to the interview at the field office  
4 level?

5 A If we send them a request for information  
6 or for supporting documentation prior to the  
7 interview, then they'll have to submit that  
8 documentation prior to the interview.

9 Q Anything else that you might require of an  
10 applicant other than specific requests for  
11 information?

12 A Typically no.

13 Q What is the current average processing time  
14 for a naturalization application at CIS?

15 A Nationally?

16 Q Nationally?

17 A Nationally speaking of averages the gross  
18 processing time, I think, as of the end of May was  
19 about 10.9 months.

20 Q Do you know what the average time is  
21 currently for the New York field office to process  
22 N-400s?

Page 131

1 A Not off the top of my head. I do track our  
2 largest offices and their performance with respect to  
3 naturalization, but I'd have to go back and look at my  
4 charts.

5 Q Do you have a belief as to whether the  
6 New York average time is greater than ten months or  
7 less than ten months?

8 A I think that we projected that New York  
9 would be above ten months at the end of the year  
10 because of the surge of applications that we received  
11 last year was not felt evenly at every office across  
12 the country.

13 Q Does CIS today have a stipulated processing  
14 time for adjudicating a naturalization application?

15 A Stipulated in what way?

16 Q Is it specified -- does CIS specify on any  
17 documents that a naturalization application should be  
18 adjudicated within a certain period of time?

19 A We have goals. We do not have  
20 stipulations.

21 Q And what is the current goal for processing  
22 of an N-400 -- for adjudication, sorry, of an N-400?

Page 132

1 A The goal that we committed ourselves to in  
2 the fee rule when we implemented the fee rule last  
3 year, but which was before we experienced the surge in  
4 naturalization applications, was that we would reduce  
5 our processing time by the end of FY 2008 from the  
6 previous processing time of about seven months to a  
7 goal of five months on average.

8 Q Is that a national goal?

9 A Yes.

10 Q Or is it -- or does that goal -- does that  
11 goal -- does CIS have different goals depending on  
12 what region is involved --

13 A No.

14 Q -- right now?

15 A No. Offices may have greater or less  
16 success based on the surge of applications that they  
17 received in able to achieve that goal, but we do not  
18 have disparate goals for naturalization processing.

19 Q But why does -- why has CIS determined that  
20 five months is its goal, its targeted time frame for  
21 adjudicating a naturalization application?

22 A That was part of the commitment that we

Page 133

1 made in terms of the fee rule, that we should be able  
2 to reduce processing times, everything else being  
3 equal, substantially below what the time frames  
4 previously had been. And so we set a goal and  
5 articulated a goal of five months --

6 Q And why was --

7 A -- as a benchmark. Why --

8 Q Why was the number five chosen?

9 A It was not an abstract. It was not done,  
10 you know, calculating each step of the process. It  
11 was done as a sense of what we could improve relative  
12 to the previous seven-month benchmark.

13 Q Do you have a view as to what -- as to a  
14 reasonable time frame for adjudicating a  
15 naturalization application?

16 MS. ONOZAWA: Objection. We're not here to  
17 explore Mr. Aytes' personal views on what's  
18 reasonable. He speaks on behalf of the agency.

19 Q You may answer that question.

20 A My sense is that five months is  
21 significantly faster than -- and I've asked this  
22 question of my staff, to go back and take a look at it



Page 134

1 because I'm interested in the answer. My own  
2 experience in over 30 years with this agency is that  
3 five months is far faster than has typically been the  
4 case with regards to processing naturalization  
5 applications.

6 Would I like to be able to reduce that time  
7 frame? Certainly. But I think five months -- my  
8 personal opinion, five months is a reasonable time  
9 frame given the level of analysis that goes into  
10 granting United States citizenship.

11 Q Does this five-month goal that CIS has  
12 right now include cases that are now pending at the  
13 FBI for name checks?

14 A Currently it does not because the way that  
15 we are -- told you earlier that our case management  
16 systems today are not robust enough to be able to  
17 track the actual chronological or processing age of  
18 each individual case and tell us how many are older  
19 than a certain age. So we have to use statistics and  
20 statistical analysis to calculate our processing  
21 times.

22 We calculate a gross time frame, which is

Page 135

1 the entire inventory of casework, and we calculate a  
2 net time frame which factors out certain activities  
3 that are beyond the control of the agency. One of  
4 those activities that is currently not counted as part  
5 of the net processing time, which is what our goals  
6 were set against, is the volume of cases where we're  
7 waiting for a final response from the FBI. But that's  
8 only one of the categories.

9 Q When you say "one of the categories," one  
10 of the categories that are excluded from the --

11 A Net.

12 Q -- net processing time?

13 A Processing time.

14 Q Yeah. And when you stated earlier that ten  
15 months is the average national -- ten months is the  
16 national average time it takes right now to adjudicate  
17 a naturalization application, does that figure of ten  
18 months also include cases that are presently pending  
19 at the FBI for name checks?

20 A Well, the answer is not markedly different.  
21 I believe the gross processing time for naturalization  
22 applications right now is about 10.9 nationally and

Page 136

1 the net processing time backing out, anything that is  
2 in active suspense is 10.4, 10.5, in that range.

3 Q Mr. Aytes, have you ever instructed CIS or  
4 INS staff to adjudicate an immigration benefit  
5 application without waiting for a definitive response  
6 from the FBI on a fingerprint check?

7 A The policy of the agency up until the mid  
8 '90s is we did not wait for a definitive response on a  
9 fingerprint check. Like the name check, at that time  
10 in the mid '90s we focused on positive responses and  
11 made the assumption that no response was a negative  
12 response. We changed that policy in the mid '90s,  
13 '96, '97, as we realized that the FBI was no longer  
14 able to meet its -- the time frames.

15 Q Have you ever instructed CIS or INS staff  
16 to proceed with the adjudication of a naturalization  
17 application without waiting for a completed name check  
18 from the FBI?

19 A Yes, if the case is otherwise deniable.

20 Q And why would a case be otherwise deniable?

21 A It may be ineligible under a variety of  
22 grounds that are apparent from the face of the

Page 137

1 application and the other record that we have before  
2 us.

3 Q So if CIS received derogatory information  
4 derived from an IBIS check and -- but had not yet  
5 received a complete FBI name check, the current policy  
6 is to proceed with adjudication?

7 A Correct, because we're not granting the  
8 benefit.

9 Q Does CIS ever tell or instruct the FBI that  
10 it should stop working on a name check in connection  
11 with a naturalization application?

12 A No. Even in those cases where we --  
13 adjustment or naturalization where based on other  
14 information we deny eligibility, we do not interrupt  
15 the flow of the name check. It continues.

16 Q Has CIS ever considered whether delays in  
17 the FBI name check process could be reduced by  
18 informing the FBI that a pending name check request --  
19 that the subject of a pending name check request has  
20 already been denied naturalization?

21 MS. ONOZAWA: I object to the question to  
22 the extent the word "considered" is seeking

<p style="text-align: right;">Page 138</p> <p>1 information protected by the deliberative process 2 privilege. 3 A Put it this way: We've tried to look at 4 just about every possibility as a way of improving 5 this process and reducing time frames, both our own as 6 well as the Bureau's. The amount of interruption that 7 the kind of change that you just described would cause 8 in the process to go and pull a particular case out of 9 the FBI's inventory from our sense would probably cost 10 more than it would save. 11 Q Meaning that it would cost the agency -- 12 A In terms of the labor -- no, in terms of 13 labor hours that the FBI would have to invest in that 14 process to go and pull that individual case, take it 15 out of their process as no longer pending for reasons 16 other than the fact that they've given us a final 17 response. 18 Q Wouldn't you simply have to give the FBI 19 the A-file number and tell them, you know, stop 20 further work on that A-file number, or is there more 21 to it? 22 A There would be a lot more to it when you're</p>	<p style="text-align: right;">Page 140</p> <p>1 know about that. 2 MS. ONOZAWA: Okay. But that's fine. 3 MR. GHACHEM: Okay. Let's break for 10 to 4 15 minutes -- or just 10 minutes if that's fine 5 with you. 6 (Recess taken.) 7 BY MR. GHACHEM: 8 Q Okay. Mr. Aytes, we spoke before the break 9 about a 2007 Memorandum of Understanding between the 10 FBI and CIS. Do you recall that -- 11 A Yes. 12 Q -- exchange? 13 Am I correct that that 2007 Memorandum of 14 Understanding proposed eliminating certain FBI file 15 classifications from the name check process, but did 16 not propose eliminating the name check itself; is that 17 right? 18 A That's correct. 19 Q And what does that entail or involve, that 20 the FBI would eliminate certain file classifications 21 in doing its name checks? 22 MS. ONOZAWA: I would direct the witness</p>
<p style="text-align: right;">Page 139</p> <p>1 talking about the volumes at which we deal. 2 Q Does the FBI associate A-file numbers with 3 its name check requests? 4 A I believe we provide that as part of the 5 information, the index information that we give the 6 FBI. 7 MR. GHACHEM: Okay. Tomoko, I have 8 about -- I'm roughly guessing 45 minutes more, 9 maybe an hour of further questioning. 10 MS. ONOZAWA: Okay. 11 MR. GHACHEM: So I wonder if we could just 12 take a quick break and then go into what I 13 envision will be our final -- our final period of 14 questioning. 15 MS. ONOZAWA: Okay. 16 MR. GHACHEM: Is that all right with you? 17 MS. ONOZAWA: Just to make something 18 clear -- I was told during one of the breaks that 19 someone -- a colleague of yours might be asking 20 Mr. Aytes some questions as well or -- 21 MR. GHACHEM: I don't know about that. 22 I'll try and find out during this break. I don't</p>	<p style="text-align: right;">Page 141</p> <p>1 not to answer to the extent that that would 2 involve disclosing information designated as law 3 enforcement privileged. 4 A I won't go into that. Thank you. There 5 are some categories, I alluded to them earlier. FBI 6 has a database of people it's trained. There's no 7 need for them to search that database with respect to 8 our applications. It won't have any effect on 9 eligibility. 10 It has databases of EEO complaints that 11 were filed against FBI employees. By definition, FBI 12 employees, they're required to be US citizens. It's 13 not pertinent to our adjudication. So we're trying to 14 whittle down as to what's relevant to our adjudication 15 their search criteria. 16 Q Are there any file classifications that 17 were eliminated that did not have to do with FBI 18 employees? 19 A Yes, there were some. Again, looking at 20 the nature of their file classification system and 21 what kind of information it contained and what was 22 relevant to our adjudications.</p>

Page 142

1 Q Did CIS ever undertake a study of the risks  
2 to national security or public safety that would be  
3 involved in eliminating certain file classifications  
4 from the FBI name check?

5 MS. ONOZAWA: I would --

6 A Additional file classifications?

7 Q I think your attorney wants to instruct  
8 you.

9 MS. ONOZAWA: I was just directing the  
10 witness not to answer to the extent that it would  
11 disclose analyses or studies or proposals subject  
12 to the deliberative process privilege.

13 THE WITNESS: Thanks.

14 A We have -- categories that were  
15 excluded were excluded based on an agreement between  
16 the FBI and CIS based on what was relevant to our  
17 adjudication and what kinds of data might be redundant  
18 to information that we're able to obtain through the  
19 other background checks that we conduct on an  
20 individual. Have we conducted a study as to what the  
21 vulnerability would be if we were to eliminate the  
22 name checks entirely? No, we have not done that

Page 143

1 because we know by definition that we only are able to  
2 get information about active investigations through  
3 the name check. And knowing that answers that  
4 question before we ask it.

5 Q Mr. Aytes, also before the break you  
6 testified that CIS has a current goal of five months  
7 for the adjudication of naturalization applications.  
8 Do you remember that?

9 A Yes, on average.

10 Q Is the agency currently meeting that goal  
11 for N-400 applications?

12 A No. We set that goal -- that goal was for  
13 the end of this year and we set that goal before we  
14 experienced the large increase in demand that we  
15 received last summer. It is still our goal, but we're  
16 going to have to work through that surge of  
17 applications in order to get to it.

18 MR. GHACHEM: I'd like to have this marked  
19 as Aytes Exhibit Number 9.

20 (Exhibit 9 was marked for identification  
21 and attached to the deposition transcript.)

22 BY MR. GHACHEM:

Page 144

1 Q Mr. Aytes, I'm handing you a document  
2 that's now marked Aytes Exhibit 9. This document is  
3 entitled "FY," fiscal year, "08/09 Production Plan  
4 Domestic Operations." And the Bates number is  
5 CIS Neufeld 0045. Do you recognize this document?

6 A Yes, I do.

7 Q What is this document?

8 A This was looking at how we would -- as we  
9 were going through the process of developing a plan to  
10 respond to the surge in applications that we received,  
11 what would be necessary if we were to try and meet  
12 those targets in the original time that we stipulated  
13 in the fee rule by end of FY 08 or alternatives.

14 Q Do you see under -- in the middle of the  
15 page just below the numerical chart, Mr. Aytes, that  
16 it says, "Even factoring in efficiency gains and  
17 overtime as described below we have a shortfall of  
18 more than 3,000 FTEs between the currently authorized  
19 FY 08 staffing levels and what would be required to  
20 meet the FY 08 targets"?

21 A Uh-huh.

22 Q "It is not feasible to grow the agency by

Page 145

1 that amount in such a short period of time." Do  
2 the -- does the joint business plan between the FBI  
3 and CIS that was announced in April of 2008 -- was  
4 that plan designed to address the staffing issues that  
5 are described in this document here, Aytes Exhibit 9?

6 A No. Those are two related but distinct  
7 issues.

8 Q Is it fair to say on the basis of this  
9 document, Mr. Aytes, Aytes Exhibit Number 9, that CIS  
10 is unlikely to meet its goal of five months average  
11 processing time for the adjudication of naturalization  
12 applications this year?

13 A We have told folks point-blank that we do  
14 not expect with the demand doubling and so much of  
15 that doubling having occurred in June and July,  
16 460,000 applications for naturalization received in  
17 the month of July when an average month's receipts is  
18 about -- ranges from 50 to 75,000, that the agency,  
19 frankly, does not have unlimited capacity and, as a  
20 result, is going to have to react and grow the  
21 additional capacity necessary to do that volume of  
22 work. We will not be at five months at the end of

Page 146

1 this year. We have made that clear to folks and  
2 posted processing times where our current projections  
3 whether have us at the end of the year.

4 Q So does CIS forecast that by the end of  
5 2008 it will be adjudicating N-400 applications on  
6 average within five months?

7 A No.

8 Q Does CIS have a forecast of when it will be  
9 able to process on average N-400 applications within  
10 five months?

11 A Yes. By the middle of 2010 we'll have  
12 worked through that entire surge. That is our  
13 forecast. We are ahead of our production plans at  
14 this point, but that is our forecast.

15 MR. GHACHEM: May I have this marked as  
16 Aytes Exhibit 10, please?

17 THE WITNESS: Just 10?

18 (Exhibit 10 was marked for identification  
19 and attached to the deposition transcript.)

20 BY MR. GHACHEM:

21 Q Mr. Aytes, I'm handing you a document  
22 marked as Aytes Exhibit 10. I obviously don't expect

Page 147

1 you to go through this all right now, but do you  
2 recognize this document?

3 A Was there a cover at one point?

4 Q There is. If I tell you that this is a  
5 chapter from the 1999 DOJ OIG report on the --

6 A On CUSA.

7 Q -- on CUSA, would you believe me?

8 A I would believe you.

9 Q It's actually a 2000 report. I'm sorry, I  
10 stand corrected. Is that your recollection that in  
11 the year 2000 DOJ -- the DOJ's Office of Inspector  
12 General issued a report on the so-called "Citizenship  
13 USA program"?

14 A Yes.

15 Q And does this document, Aytes Exhibit  
16 Number 10, represent a section of that report?

17 A I'll take your word for the latter, but  
18 yes, there was a report that was issued in '99-2000.

19 Q Do you have any reason to believe this is  
20 not a section --

21 A Nope, no reason.

22 Q -- from that report?

Page 148

1 Okay. And you see on the first page,  
2 CIS 000585, that this appears to be a section of the  
3 report surveying the criminal history checking  
4 procedures --

5 A Yes, sir.

6 Q -- of CIS? Okay. Could I ask you to turn  
7 to page 96 of this report, please, Mr. Aytes?

8 A Okay.

9 Q Under heading C there do you see it reads,  
10 "Despite indications of fingerprint processing  
11 shortcomings, INS did not delay the adjudication of  
12 the 85,000 cases"?

13 A Yes.

14 Q Could you just take a quick look at the  
15 paragraph -- quick read through the paragraph below  
16 that and --

17 A Oh, I remember that paragraph.

18 Q Okay. And tell me what is your  
19 understanding of what this understanding is about?

20 A This had to do with fingerprint cards  
21 themselves and the submission of fingerprint cards at  
22 the preliminary stage of processing of applications to

Page 149

1 the FBI to conduct a fingerprint check.

2 Q Okay. Do you see at the bottom of this --  
3 of this page here it reads, the bottom three lines,  
4 "Because of this focus on production, Aytes never  
5 reconsidered his decision to move forward with the  
6 adjudication of the 85,000 cases despite the findings  
7 that all of the fingerprint checks had not been  
8 completed"?

9 A Wouldn't necessarily agree with their  
10 conclusion, but --

11 Q I'll ask you about --

12 A -- yeah.

13 Q I'll ask you about that in just a minute.

14 So according to this report, you made a  
15 decision to move forward with the adjudication of  
16 85,000 naturalization cases without waiting for  
17 completion of FBI fingerprint checks.

18 A We went forward with the processing and  
19 scheduling of interviews for those cases. That was --  
20 the issue at that point was whether the service center  
21 had receipted the case, whether or not the fingerprint  
22 cards had gone in timely, whether or not the

Page 150

1 fingerprint -- fingerprint evaluation process was  
2 ongoing, and whether or not that freed us to go ahead  
3 and schedule the cases for interview.

4 Q The report here says that -- or suggests  
5 that you actually proceeded to allow the adjudication  
6 of the 85,000 cases. Is the report incorrect in that  
7 respect?

8 A Adjudication can be used in a broad  
9 framework. Many times it's used to refer to the  
10 entire process, not simply the decision itself. And I  
11 believe in this context that's the ways that that's  
12 being used.

13 Q Okay. So is it your testimony that in fact  
14 you did not permit these 85,000 cases to proceed to  
15 final adjudication --

16 A We -- I permitted them to move forward in  
17 the process and be scheduled for an interview. Now,  
18 the way the process works -- or worked at that time,  
19 since it was an assumption that if we did not hear  
20 back from the FBI within a given period of time that  
21 the response was no record, if in fact the fingerprint  
22 cards had never been submitted to the FBI, then yes,

Page 151

1 then that would have meant that those cases would have  
2 been potentially adjudicated absent the FBI name  
3 check -- or the FBI fingerprint check being conducted.

4 Q Okay. But if the -- if the fingerprint  
5 check request had actually been submitted to the FBI,  
6 none of those 85,000 cases would have been permitted  
7 to proceed to final adjudication --

8 A If they --

9 Q -- without the results being returned?

10 A At this time in the period of CUSA, the  
11 process for fingerprints was similar to the process  
12 that continued for some period of time after that for  
13 name checks. Process was you submit it to the FBI,  
14 you wait a presumptive period and then you are free to  
15 move forward based on the conclusion that the FBI has  
16 completed their processing and the answer is no  
17 record. The FBI fed us positive records at that time.  
18 They didn't give us an answer on every case.

19 Q What was the -- what was the presumptive  
20 period during which --

21 A I don't recall what the presumptive period  
22 was. I'm sorry.

Page 152

1 Q Could it have been -- well, would 60 days  
2 sound like --

3 A Well, that's what it references at the top  
4 of the page that you just referenced.

5 Q If you'd turn --

6 A Yeah, top of page 97.

7 Q Okay. So 97 -- on page 97 is indicates  
8 that the presumptive waiting period was 60 days?

9 A Uh-huh.

10 Q Does that refresh your memory of what CIS's  
11 practice was at the time of this report?

12 A For fingerprint cards --

13 Q Fingerprint checks?

14 A -- yes, was to wait 60 days. We focused  
15 on -- we only got responses on the positive hits, and  
16 not on negatives. And so at the end of 60 days we  
17 were free to move forward concluding that the FBI had  
18 completed its processing and it was a no record.

19 Q And did INS have the same 60-day  
20 presumptive waiting period for naturalization  
21 applications?

22 A The same 60-day period was the period for

Page 153

1 fingerprint checks across the board.

2 Q Okay. So in other words, for all  
3 immigration benefit applications?

4 A Yes. Yeah. The conclusion was that the  
5 FBI was done and that the answer was negative if we  
6 did not hear a positive response within 60 days.

7 Q Will you turn to page 93 of the report? Do  
8 you see at the bottom of that page the reporter refers  
9 to an automated sweep to change N-400 data?

10 A Yes.

11 Q Can you tell me what that refers to, an  
12 automated sweep to change N-400 data?

13 A My recollection after more than ten years  
14 was that the service center had keyed in a volume --  
15 85,000 naturalization applications and discovered  
16 after the fact that they had not -- the service  
17 centers were new to receiving these applications.  
18 That was part of the transition that we implemented to  
19 deal with the production challenges of CUSA. The  
20 center did not indicate in one field that the  
21 fingerprint card had been submitted. Now, that would  
22 tell the system that process couldn't continue because



Page 154

1 there was a -- the system was designed in such a way  
 2 that unless it knew that it had been submitted on a  
 3 given date it never knew when the 60-day clock would  
 4 lapse.  
 5 We discovered that error in Vermont -- I  
 6 think it was Vermont -- that they had not done that.  
 7 We did some sampling. Found that in fact -- we did a  
 8 small sample -- that cases were reaching the FBI.  
 9 While the sample was not definitive that every case  
 10 had reached the FBI, it told us that the process had  
 11 been working as designed and the lapse was as had been  
 12 reported; not that the fingerprint cards were not  
 13 submitted, but that they simply hadn't appropriately  
 14 recorded in the system. So we went into the system on  
 15 those cases and corrected the database to reflect that  
 16 those cards had been submitted to the FBI.  
 17 Q And the purpose of doing that was to ensure  
 18 that the 60-day presumptive waiting period would be  
 19 enforced and that applications would not be waiting  
 20 longer than necessary; is that correct?  
 21 A Yes, that those applications individually  
 22 wouldn't be waiting longer for -- than necessary, if

Page 155

1 in fact the fingerprint cards had been submitted as  
 2 the service center had represented.  
 3 Q Were there any risks to national security  
 4 or public safety involved in proceeding with  
 5 adjudication of a naturalization application once the  
 6 presumptive 60-day waiting period was over?  
 7 A As we realized that the FBI was not able to  
 8 keep up with the 60-day time frame, that's why we  
 9 altered the process substantially and as part of those  
 10 changes went to requiring a negative as well as a  
 11 positive response and waiting for that response before  
 12 we moved forward. We did not then, and do not now,  
 13 simply initiate background checks to initiate them.  
 14 We initiate them to complete them and get the  
 15 pertinent information that's relevant to our  
 16 adjudication.  
 17 Q Mr. Aytes, I want to direct your attention  
 18 to a subject that we discussed earlier this morning;  
 19 namely, the 2002 rule changes. Am I correct that in  
 20 2002 INS naturalized an applicant who was later  
 21 discovered on the basis of information derived from an  
 22 FBI name check to have been affiliated or associated

Page 156

1 with a terrorist organization?  
 2 MS. ONOZAWA: Object as asked and answered,  
 3 and this is also outside the scope of his 30(b)(6)  
 4 deposition.  
 5 MR. GHACHEM: Well, Mr. Collette, it is my  
 6 understanding, has testified today that Mr. Aytes  
 7 is one of the people at CIS with knowledge of this  
 8 subject and that he, Mr. Collette, is not. So if  
 9 that's what the testimony is and these are the two  
 10 individuals that you've designated to talk about  
 11 these two topics, it seems to me that your agency  
 12 is telling us that Mr. Aytes is a person who can  
 13 speak about this topic.  
 14 MS. ONOZAWA: May I speak to Mr. Aytes?  
 15 MR. GHACHEM: You may, yeah. You may,  
 16 sure, yeah.  
 17 (Recess taken.)  
 18 MR. GHACHEM: Let's go back on the record  
 19 now, please.  
 20 BY MR. GHACHEM:  
 21 Q Mr. Aytes, is it true that the INS  
 22 naturalized a person in 2002 whom the FBI later

Page 157

1 returned information about suggesting that the  
 2 individual was affiliated with or associated with a  
 3 terrorist organization?  
 4 A I don't know whether or not that additional  
 5 information came as a result of the name check or came  
 6 through other channels, but yes, we found out that  
 7 there was a -- that specific individual where there  
 8 was information in the FBI's databases relative to our  
 9 adjudication that we had not received through the name  
 10 check response.  
 11 Q Did you ever receive information that would  
 12 have provided grounds to denaturalize this individual?  
 13 MS. ONOZAWA: Objection. This is outside  
 14 the scope of his 30(b)(6) deposition.  
 15 A I couldn't answer that question. I don't  
 16 know the specifics of that case.  
 17 Q Did you ever receive information from the  
 18 FBI indicating that this person had a criminal  
 19 history?  
 20 MS. ONOZAWA: Objection, outside of scope  
 21 of his 30(b)(6) deposition.  
 22 A Again, I don't know the specifics of that

<p style="text-align: right;">Page 158</p> <p>1 case. What was more important to us is what that</p> <p>2 illustrated to us about the process than the relevance</p> <p>3 to that -- while each case is important -- than the</p> <p>4 relevance to that particular application.</p> <p>5 Q Mr. Aytes, would you agree that the 2002</p> <p>6 rule changes that we discussed earlier caused the</p> <p>7 agency to have to delay the processing of N-400</p> <p>8 applications?</p> <p>9 A It affected the processing of many N-400</p> <p>10 applications, yes.</p> <p>11 Q What was the extent of the delays that it</p> <p>12 caused for processing N-400 applications?</p> <p>13 A I don't know the specifics because the</p> <p>14 agency didn't track processing times in the way that</p> <p>15 it does now. It did -- given the sheer volume of</p> <p>16 checks that were reconducted, it did affect some cases</p> <p>17 significantly.</p> <p>18 MR. GHACHEM: I'd like to have this marked</p> <p>19 as Aytes Exhibit 11.</p> <p>20 (Exhibit 11 was marked for identification</p> <p>21 and attached to the deposition transcript.)</p> <p>22 BY MR. GHACHEM:</p>	<p style="text-align: right;">Page 160</p> <p>1 Q Yeah, just 1, 2 and 3, please.</p> <p>2 MS. ONOZAWA: I think the statute speaks</p> <p>3 for itself. You don't have to have the witness</p> <p>4 read it out loud.</p> <p>5 A That's right, but I don't mind. "One,</p> <p>6 Confirmation from the Federal Bureau of Investigation</p> <p>7 that an applicant does not have an administrative or a</p> <p>8 criminal record; two, confirmation from the Federal</p> <p>9 Bureau of Investigation that an applicant has an</p> <p>10 administrative or criminal record; or three,</p> <p>11 confirmation from the Federal Bureau of Investigation</p> <p>12 that two properly prepared fingerprint cards, Form</p> <p>13 FD258, have been determined unclassified for the</p> <p>14 purpose of conducting a criminal background check and</p> <p>15 have been rejected."</p> <p>16 Q Do you know when the agency promulgated</p> <p>17 this regulation?</p> <p>18 A No, I do not, sir.</p> <p>19 Q Do you know if it was in force in 2002?</p> <p>20 A I believe it continues to be in force.</p> <p>21 Q My question was --</p> <p>22 A Yes.</p>
<p style="text-align: right;">Page 159</p> <p>1 Q Mr. Aytes, I'm handing you a document</p> <p>2 that's marked Aytes Exhibit 11. This is -- it says</p> <p>3 it's a Westlaw document that at the top is entitled</p> <p>4 "8 CFR 335.2." Are you familiar with this document?</p> <p>5 A I'm familiar with 8 CFR 335.2.</p> <p>6 Q What is that?</p> <p>7 A That's one of the regulations that sets</p> <p>8 parameters for the processing of naturalization</p> <p>9 applications.</p> <p>10 Q Could you read Section B of this -- of this</p> <p>11 regulation 335.2 Section B?</p> <p>12 A "Section B, Completion of criminal</p> <p>13 background checks before examination. The service</p> <p>14 will notify applicants for naturalization to appear</p> <p>15 before a service officer for initial examination on</p> <p>16 their naturalization application only after the</p> <p>17 service has received a definitive response from the</p> <p>18 Federal Bureau of Investigation that a full criminal</p> <p>19 background check on an applicant has been completed.</p> <p>20 Definitive response that has a full criminal</p> <p>21 background check on an applicant has been completed</p> <p>22 includes" -- should I continue?</p>	<p style="text-align: right;">Page 161</p> <p>1 Q -- do you know whether it was in force in</p> <p>2 2002.</p> <p>3 A I believe it was.</p> <p>4 Q What about 2001?</p> <p>5 A I believe it was.</p> <p>6 Q What about 1999?</p> <p>7 A I believe it was.</p> <p>8 Q Okay. Do you know whether the agency</p> <p>9 provided notice and opportunity for the comment -- for</p> <p>10 the public to comment on this regulation before it was</p> <p>11 implemented?</p> <p>12 A I can assume that that was done. I do</p> <p>13 not -- I cannot definitively tell you myself that it</p> <p>14 was. I'm not even sure when that regulation itself</p> <p>15 was promulgated.</p> <p>16 Q Do you know whether the agency, CIS, ever</p> <p>17 considered providing the public with an opportunity to</p> <p>18 comment on the 2002 rule changes?</p> <p>19 MS. ONOZAWA: Objection to the extent that</p> <p>20 it calls for information protected by the</p> <p>21 deliberative process privilege.</p> <p>22 A I think the 2002 rule changes more than</p>

<p style="text-align: right;">Page 162</p> <p>1 anything reiterated the -- and established certain 2 procedures for managing compliance with this section 3 of regulation. 4 Q When you say "this section," meaning 5 Section 335.2? 6 A 335.2. 7 Q So the answer -- what's the answer to the 8 question, then, whether or not the agency considered 9 providing the public with an opportunity to comment on 10 the 2002 rule changes? 11 A I'm not aware that the agency discussed 12 whether or not it was appropriate or required to seek 13 public comment on an administrative change of that 14 nature. 15 Q When I use the phrase "2002 rule changes," 16 do you understand that I mean the requirement that FBI 17 search both the main and reference files in connection 18 with a name check as well as the requirement that the 19 CIS await a definitive response from the FBI before 20 adjudicating an N-400 -- 21 A Correct. 22 Q -- application?</p>	<p style="text-align: right;">Page 164</p> <p>1 that I would categorize as specifically contesting the 2 changes that you have summarized as "the 2002 3 changes." 4 Q Have the 2002 rule changes had a 5 significant impact on the agency's ability to 6 adjudicate N-400 applications? 7 A Individually, not collectively. 8 Q What do you mean by, "individually, but not 9 collectively"? 10 A It's had some -- it's had significant 11 impact on individual applications where there appears 12 to be information relevant to the case in the FBI's 13 system, which then causes us to wait for an answer. 14 Given that the vast majority of FBI responses come 15 back relatively quickly, it does not cause a 16 significant systemic delay in the processing of 17 applications. 18 Q Do you know if anyone else in the agency 19 would have information about whether or not the agency 20 considered providing the public with an opportunity to 21 comment on the 2002 rule changes? 22 A Have to go back and talk to the folks that</p>
<p style="text-align: right;">Page 163</p> <p>1 Did CIS study whether or not those changes, 2 the 2002 rule changes, had a financial impact on the 3 agency's operations? 4 MS. ONOZAWA: Again, I object to the 5 question to the extent that it calls for 6 information protected by the deliberative process 7 privilege. 8 A I believe -- while the agency is always 9 cognizant of the impact on costs and revenue, I 10 believe the 2002 decision was made based on the need 11 for consistency with the regulation as cited and with 12 the statute and the eligibility criteria for 13 naturalization. 14 Q Has the agency received comments from 15 members of the public about the 2002 rule changes? 16 A About the changes that were made not 17 through regulation? 18 Q About -- yes, about the changes that are 19 reflected in the December 2002 letter that we reviewed 20 earlier. 21 A We have received individual case inquiries 22 and complaints. I personally don't know of anything</p>	<p style="text-align: right;">Page 165</p> <p>1 were in leadership positions in INS at that point in 2 time. 3 Q Who would they be? 4 A Doris Meisner was the -- no, Doris wasn't 5 the commissioner then. Who was the commissioner in 6 2002? Ziglar? Commissioner Ziglar? You'd have to go 7 back -- I'm sure we could provide you with a list of 8 folks who were in leadership positions. You have 9 named some of them from the documents you've shown me, 10 folks like Johnny Williams. 11 Q What about individuals within the 12 regulatory unit that you described to me earlier 13 today? Would they know about this? 14 A The regulatory unit was very, very 15 different in 2002 than it is today. 16 Q Would they know about whether or not the 17 agency would have considered giving the public an 18 opportunity to comment on the 2002 rule changes? 19 A They might, but I doubt it because I doubt 20 that there was any substantive conversation in that 21 respect. The agency conducts a number of background 22 checks on a number of different types of applications</p>

Page 166

1 consistent with the eligibility criteria established  
2 by statute and preexisting regulation. And the agency  
3 has never made it a practice to go out and divulge and  
4 seek public comment on the parameters that it sets for  
5 the background checks that it conducts necessary to  
6 make those eligibility determinations.

7 Q Did the agency feel that it was necessary  
8 to provide the public with an opportunity to comment  
9 on Exhibit 11, Section 335.2, when it was proposed?

10 MS. ONOZAWA: Objection to the extent it  
11 calls for information protected by the  
12 deliberative process privilege and that it calls  
13 for a legal conclusion.

14 You may answer.

15 A I said earlier I do not know. I don't know  
16 when this regulation was promulgated. I don't know if  
17 it was a final rule as opposed to a proposed rule. If  
18 it was final, it would have been interim final. You  
19 know, regulations are done with a stipulated comment  
20 process. So I'm sure that there were comments with  
21 regards to the fact that we were conducting some form  
22 of background checks with the FBI as part of our

Page 167

1 adjudication of naturalization applications.

2 Q Mr. Aytes, could you take a look again at  
3 Aytes Exhibit Number 10, which is the chapter from the  
4 1990 -- the 2000, I'm sorry, OIG report?

5 A Yes, sir.

6 Q Could you refer to pages 149 to 150? Do  
7 you see at the top of page 149 that it reads, "INS  
8 considers the value of the biocheck process"?

9 A Uh-huh.

10 Q If you'd turn to the next page, page 150,  
11 in the top paragraph there about three lines down it  
12 says, "Associate Commissioner Crocetti wrote to the  
13 FBI on April 30 that INS questioned the value of such  
14 checks," meaning the bio checks, "and asked whether  
15 the FBI believed such checks were necessary. The  
16 FBI's May 14 response referred Crocetti back to its  
17 own regulations?

18 A Yes.

19 Q Can you tell me what that letter by  
20 Associate Commissioner Crocetti was about?

21 MS. ONOZAWA: Objection, foundation. You  
22 haven't established that he's aware of this

Page 168

1 letter --

2 Q Are you aware that Associate Commissioner  
3 Crocetti wrote a letter to the FBI on April 30 -- it  
4 looks like 1995 from the previous page?

5 A Take your word for it. I know there were  
6 discussions about that time with the FBI about the  
7 value of name checks relative to other kinds of  
8 background checks that were being conducted.

9 Q And did Associate Commissioner Crocetti  
10 participate in those discussions?

11 A He at least participated to the extent to  
12 which he signed the letter. I believe he participated  
13 in some of those discussions.

14 Q Have you ever seen the April 30 letter  
15 that's referred to at the top of page 150 of  
16 Exhibit 10?

17 A I couldn't honestly tell you whether I've  
18 ever seen that letter from 12 years ago. I might have  
19 and I might not have. Any answer I gave you is a  
20 50/50 chance of being wrong.

21 MR. GHACHEM: Tomoko, can you provide us  
22 with a copy of this Crocetti April 30 letter?

Page 169

1 MS. ONOZAWA: To the extent it's readily  
2 available, relevant, not subject to privilege,  
3 we'll undertake a search for it and produce it.

4 MR. GHACHEM: Thank you.

5 Q Mr. Aytes, is the FBI name check the only  
6 kind of background check that will reveal information  
7 about active investigations about a particular  
8 naturalization applicant?

9 A That is my --

10 MS. ONOZAWA: I object to that question  
11 again we're straying into topics that are  
12 designated for Mr. Smith.

13 A My understanding --

14 MS. ONOZAWA: I would direct you not to  
15 answer.

16 THE WITNESS: Okay. Okay.

17 Q Mr. Aytes, the 2007 Memorandum of  
18 Understanding that the FBI entered into with CIS --  
19 strike that, please.

20 MR. GHACHEM: I'd like to have this marked  
21 as Aytes Exhibit 12.

22 (Exhibit 12 was marked for identification

<p style="text-align: right;">Page 170</p> <p>1 and attached to the deposition transcript.) 12.</p> <p>2 BY MR. GHACHEM:</p> <p>3 Q Mr. Aytes, I'm handing you a document that</p> <p>4 is marked Exhibit 12. The beginning Bates number is</p> <p>5 Yakub, Y-A-K-U-B, 005460. Do you recognize this</p> <p>6 document?</p> <p>7 A Seen the logo and I've heard the title. So</p> <p>8 I'll say yes.</p> <p>9 Q Can you tell me what this document is?</p> <p>10 A Kind of hard to do from what I see in front</p> <p>11 of me. It appears to be a paper that talks in some</p> <p>12 respects about the IBIS system and the things that it</p> <p>13 does and its use with respect to the adjudications</p> <p>14 process.</p> <p>15 Q When you say it's hard to do, are you</p> <p>16 referring to the fact that there are -- a lot of the</p> <p>17 sections have been redacted from this report?</p> <p>18 A Uh-huh.</p> <p>19 Q Do you have any reason to believe that this</p> <p>20 is not an accurate copy of the -- of the issues paper?</p> <p>21 A No.</p> <p>22 Q Can you turn to page 3, which is Bates</p>	<p style="text-align: right;">Page 172</p> <p>1 information about active investigations that the IBIS</p> <p>2 check gives you?</p> <p>3 MS. ONOZAWA: I object to the question to</p> <p>4 the extent it relates to topic 7, the purpose, use</p> <p>5 and value of the FBI name checks related to</p> <p>6 immigration benefit applications.</p> <p>7 MR. GHACHEM: I'd like to have this marked</p> <p>8 as Aytes Exhibit 13.</p> <p>9 (Exhibit 13 was marked for identification</p> <p>10 and attached to the deposition transcript.)</p> <p>11 BY MR. GHACHEM:</p> <p>12 Q Mr. Aytes, I'm now handing you a document</p> <p>13 marked as Aytes Exhibit 13. The Bates number on this</p> <p>14 document, first page, is CIS Smith 002. Do you</p> <p>15 recognize this document.</p> <p>16 A I recall this e-mail.</p> <p>17 Q Is this an e-mail?</p> <p>18 A This is an e-mail.</p> <p>19 Q I'm sorry, I think I'm missing the cover</p> <p>20 page of your --</p> <p>21 (Discussion off the record.)</p> <p>22 Q Mr. Aytes, do you have any more information</p>
<p style="text-align: right;">Page 171</p> <p>1 number YAKUB 005462?</p> <p>2 A Uh-huh.</p> <p>3 Q Do you see at the bottom of the page the</p> <p>4 text reads, "Since May 2002 the IBIS program has</p> <p>5 produced the following successes: Field offices have</p> <p>6 referred over 300 cases to the national security unit</p> <p>7 for investigation relating to possible terrorist links</p> <p>8 and are threats to national security"?</p> <p>9 A Uh-huh.</p> <p>10 Q Does the IBIS program tell CIS whether or</p> <p>11 not there is an active investigation underway</p> <p>12 regarding any naturalization applicant?</p> <p>13 A About certain types of active</p> <p>14 investigations only.</p> <p>15 Q What types -- I'm sorry. Go ahead.</p> <p>16 A Those relating to certain national security</p> <p>17 issues. It does not give us access to other</p> <p>18 information about active investigations.</p> <p>19 Q Where would you get that other information</p> <p>20 from?</p> <p>21 A FBI name check.</p> <p>22 Q Would the FBI name check give you the</p>	<p style="text-align: right;">Page 173</p> <p>1 about the impact of the 2002 rule changes on the</p> <p>2 processing of naturalization applications that you</p> <p>3 haven't already shared with me today?</p> <p>4 A No. I've said it affects discretely, you</p> <p>5 know, individual applications where we have to wait</p> <p>6 for the FBI's final answer. We have quantitatively</p> <p>7 tracked the volume of applications that are in</p> <p>8 suspense over the last couple of years. We're waiting</p> <p>9 for the FBI's final answer.</p> <p>10 Of course that doesn't tell us how old</p> <p>11 those individual cases are. And with the exception of</p> <p>12 those few naturalization applications that -- where</p> <p>13 we're still waiting for an answer where we conducted</p> <p>14 our interview before May of 2006, because those are</p> <p>15 now in active suspense postinterview, I think I've</p> <p>16 shared with you what I know about the impact.</p> <p>17 Q Do you have any more information about the</p> <p>18 February 2008 change in the procedures for</p> <p>19 applications for adjustment to LPR status that you</p> <p>20 haven't already shared with me?</p> <p>21 A No.</p> <p>22 Q Mr. Aytes, is it true that in July of 2007</p>



Page 174

1 CIS increased the fee for naturalization applications  
2 from \$330 to \$595?

3 A I believe that's the number.

4 Q When was the last time that CIS had  
5 increased the naturalization application fee prior to  
6 July 2007, do you know?

7 A I'm sorry, I don't recall the date. It had  
8 been several years.

9 Q Why did CIS increase the fee in July 2007  
10 for N-400 applications?

11 A It increased the fee as it did a fee study  
12 across all of its applications, because we are a  
13 fee-funded agency, to set fees at levels that  
14 recovered our costs of processing those applications.  
15 We had been receiving subsidies from Congress for  
16 several years designed to eliminate our backlog caused  
17 in large part because we -- our fees did not provide  
18 sufficient revenue for us to have the capacity  
19 necessary to process those applications timely.

20 Q And did that include -- was the July 2007  
21 fee also inadequate to cover the costs of processing  
22 N-400 applications?

Page 175

1 A No, we believe the July 2007 fee is set  
2 based on the costs -- the average cost of processing a  
3 naturalization application.

4 Q I'm sorry, I misspoke in my question. I  
5 meant to ask was the fee that was in place prior to  
6 July 2007, namely \$330, was that adequate to cover the  
7 costs of N-400 applications --

8 A Not -- it was at the time that that fee was  
9 set based on the narrow things that we covered through  
10 fees. We did the fee study because it, as well as our  
11 other fees, no longer recovered our costs.

12 Q Was the agency aware that there would be a  
13 surge in naturalization applications in the weeks  
14 preceding the July 2007 fee increase?

15 A We anticipated a surge across most  
16 applications. History told us that there would be a  
17 surge for most applications. We in fact saw a surge  
18 of about 16 to 17 percent in application volume. We  
19 were also cognizant of the campaigns that independent  
20 organizations were conducting to stimulate demand in  
21 naturalization and were following its impact on the  
22 volume that we were receiving.

Page 176

1 So yes, we were aware and anticipated a  
2 surge and in fact did two reprogrammings, budgetary  
3 adjustments, with Congress to use additional revenue  
4 that was coming in as volume was going up to target  
5 that for additional overtime and other expenses  
6 necessary to process those cases.

7 Q Were there discussions within CIS about the  
8 predicted surge?

9 MS. ONOZAWA: I object to that question to  
10 the extent it calls for information protected by  
11 the deliberative process privilege.

12 A There were discussions about what we saw  
13 happening, what we expected to happen with  
14 naturalization volume. We certainly anticipated that  
15 we might reach close to a million applications, which  
16 is what many of the independent organizations had set  
17 as a goal in terms of generating those naturalization  
18 applications. Did we anticipate 465,000 applications  
19 in the month of July, which is about eight months  
20 worth of typical receipts? No, because we had never  
21 historically seen that.

22 Q You refer to independent organizations.

Page 177

1 What organizations are those?

2 A Organizations like NALEO that were out  
3 there with -- with campaigns.

4 Q These are private groups that --

5 A Yes.

6 Q -- advocate on behalf of immigrants?

7 A On behalf of their constituencies and on  
8 behalf of immigrants in general.

9 Q Can you tell me what steps CIS took to  
10 accommodate the surge that it anticipated in response  
11 to the July 2007 fee increase?

12 A We allotted a significant amount through  
13 these reprogrammings, additional overtime, for  
14 example. We increased the capacity of our biometric  
15 collection operations. We were at that time  
16 recompeting the contract for mail file and data entry  
17 operations to support intake functions at the service  
18 centers. And so we structured that in a way so that  
19 there would be greater flexibility prospectively to  
20 deal with surges. We took a number of steps.

21 We overall anticipated that the resources  
22 that we were planning on adding based on the fee rule

Page 178

1 would help us deal with the surge over a reasonable  
 2 period of time because we anticipated that the surge  
 3 that we would see in June and July, that million that  
 4 we would get that year, according to estimates, some  
 5 of that would be people who would file early to take  
 6 advantage of the fee -- the opportunity to file before  
 7 the fee increase. And so that there would be a  
 8 corresponding -- not equivalent, but, you know, some  
 9 drop in demand once the fee rule was implemented for a  
 10 couple of months. So we felt all things considered  
 11 that the preexisting plans plus some of the types of  
 12 things I've talked about with additional overtime  
 13 would allow us over the course of the year to still  
 14 meet our goals. And then we got hit with 460,000  
 15 applications.

16 Q Did you anticipate 460,000 additional  
 17 applications?

18 A Nope. There's nothing that would have led  
 19 us to believe that naturalization application volume  
 20 would have increased eightfold.

21 Q What amount of increase did you anticipate?

22 A We expected that -- you know, the

Page 179

1 organizations were telling us they thought that they  
 2 could -- that their goal was a million. We were  
 3 tracking receipts over the course of the year. It  
 4 looked like getting to a million or slightly higher  
 5 was very reasonable.

6 Q Over the course of the year?

7 A Over the course of the year.

8 Q 2007?

9 A But we were watching it each -- each month  
 10 and in fact we got to a million the end of June. The  
 11 problem was July.

12 Q Which -- and in July there were 460,000?

13 A 460,000 naturalization applications filed  
 14 in a single month.

15 Q How many new applications did you  
 16 anticipate in that month, July?

17 A In June I think we received something like  
 18 150,000, which was a fairly startling number. Again,  
 19 you would expect that in a normal month we would  
 20 receive between -- because there is some ebb and flow  
 21 to naturalization over the course of a year. While  
 22 it's not seasonal, it just does seem to work out that

Page 180

1 way -- between 50 and 75,000 in an average month.

2 Q Okay. What was the time frame for the  
 3 steps that you just described that CIS undertook to  
 4 accommodate the anticipated surge?

5 A Some of those steps like the additional  
 6 overtime, the two reprogrammings that we did were done  
 7 before the end of the fiscal year. Other steps like  
 8 the introduction of the surge plan which called for  
 9 even for additional hiring above and beyond the fee  
 10 rule to take the -- over \$400 million in additional  
 11 revenue that we received through these additional  
 12 applications and to invest that back in the necessary  
 13 capacity to do the work; additional overtime,  
 14 additional staffing, some other very discrete targeted  
 15 investments.

16 That was done over the course of the fall  
 17 as we really started to get a better sense of what the  
 18 true volume was. Because we didn't just see -- when  
 19 we saw a 16 to 17 percent increase in general  
 20 application volume just in those two months before the  
 21 new fees took effect, we had two things going on at  
 22 the same time. One was a surge in naturalization and

Page 181

1 the other was the Department of State opened the  
 2 unique opportunity in July through its visa bulletin  
 3 to allow persons to apply for permanent residence  
 4 based on employment-based eligibility, which generated  
 5 300,000 applications for permanent residence and an  
 6 associated 500,000 additional applications for other  
 7 benefits. So it took us a while to even understand  
 8 and truly quantify the volume of applications that we  
 9 were getting because we had so many coming in the  
 10 door.

11 Q You testified that the Department of State  
 12 implemented a policy change that permitted 300,000 new  
 13 applications for adjustment to LPR status in July  
 14 2007; is that correct?

15 A Yeah, through the visa bulletin.

16 Q Were those new applications a factor in  
 17 your decision, that is CIS's decision, in February  
 18 2008 to change the LPR policy?

19 A No, it was not, because while we had to  
 20 take those applications in because we used the visa  
 21 bulletin to gauge whether someone is eligible to file  
 22 the application, we still can't complete the

<p style="text-align: right;">Page 182</p> <p>1 application until there is an actual individual visa 2 number available for each case. 3 The law limits how many people can 4 immigrate to this country a year in these employment 5 categories, and so it can only allot -- the State 6 Department can only allot a certain number of visas in 7 each quarter. And so even if I had the capability to 8 process all 300,000 this year, I couldn't approve 9 them. So it would be of no relevance at all to 10 implement the policy in February of 2008 to those 11 300,000 applications. 12 Q So you were aware of a potential 300,000 13 new applications for adjustment to LPR status, but 14 they played no role in the February 2008 policy 15 change? 16 A Right. We can only issue -- I think in 17 2008 the limit is about 160,000 employment-based visas 18 are available. The State Department uses some of 19 those for immigrant visas for people overseas. It's 20 going to take many years. 21 The interesting anomaly behind that July 22 visa bulletin -- I said it gave people a unique</p>	<p style="text-align: right;">Page 184</p> <p>1 the first page is CIS Smith 002; is that correct? 2 A Yes. 3 Q Okay. Do you recognize this document? 4 A I recall this document, yes, sir. 5 Q What is this document? 6 A This was simply a brief side-by-side that 7 described the three basic kinds of searches that -- 8 background check searches that USCIS conducts, the 9 TECS/IBIS check, the FBI name check and the FBI 10 fingerprint check, and then goes into some detail with 11 respect to the current -- or the then-current 12 situation with regards to FBI name check processing. 13 And then on page 2 some discussions of possible steps 14 to work with the FBI to improve their ability to 15 process and work through the backlog of name checks. 16 Q When was this document created? 17 A That I don't recall. I'm sorry. And I 18 don't see it on the face of the document anywhere. 19 Q Is it a recent document? 20 A I'm guessing last summer. 21 Q You believe you saw this last summer? 22 A I'd say about a year old.</p>
<p style="text-align: right;">Page 183</p> <p>1 opportunity to apply. Many of those people, while 2 they were eligible to apply because the visa bulletin 3 said anyone who had eligibility could file, the 4 reality based on the limitations of the law of how 5 many people can be granted permanent residence a year 6 in these discrete categories -- and there are limits 7 also by country. Some of these individuals' 8 applications for permanent residence will remain 9 pending for many years. I may -- we may be done with 10 them. We may be ready to approve them, but we cannot 11 execute that approval until a visa number is available 12 to that individual application. So the February 2008 13 policy change really does not affect those 14 applications at all. 15 MR. GHACHEM: I'd like to have this marked 16 as Aytes Exhibit 14. 17 (Exhibit 14 was marked for identification 18 and attached to the deposition transcript.) 19 BY MR. GHACHEM: 20 Q Mr. Aytes, I'm handing you -- I have handed 21 you a document that is now marked as Aytes Exhibit 14. 22 The Bates number at the bottom of the page is -- of</p>	<p style="text-align: right;">Page 185</p> <p>1 Q It's about a year old? 2 A I mean, there is a -- under "Status" on 3 page 1, you know, there is in fact a reference by June 4 2007, 13 months later, the number older than six 5 months. So there was some reference point. I don't 6 know that they would have picked June 2007 if they 7 were doing this paper months thereafter and certainly 8 they couldn't have done it earlier than that. 9 Q Do you know who produced this document? 10 MS. ONOZAWA: I would note that the Bates 11 number is stamped CIS_Smith 0033. So it would be 12 from the files of Greg Smith. 13 MR. GHACHEM: So would you stipulate, then, 14 that this has been created by Greg Smith? 15 MS. ONOZAWA: I can't stipulate to that, 16 but I can stipulate that it was in the files of 17 Greg Smith and it was produced in accordance with 18 this litigation. 19 MR. GHACHEM: Okay. So could you please 20 read back, madam reporter, my last question to the 21 witness? 22 (Record read.)</p>

Page 186

1 A Not specifically. Documents like this  
 2 usually have many hands.  
 3 Q Can you turn to page 2 of the document,  
 4 Mr. Aytes? Do you see under bullet point number 2  
 5 that it reads, "USCIS also proposes to immediately  
 6 modify its internal procedures with respect to how  
 7 long it waits for the FBI search"?  
 8 A So I guess it was a little later than June.  
 9 Yes.  
 10 Q Why would you say it was a little later  
 11 than June?  
 12 A Because that decision to make that change  
 13 on adjustment processing was not made, nor considered,  
 14 last June.  
 15 Q Can you look further down, Mr. Aytes, to  
 16 bullet point number 5, please, which states,  
 17 "Predicated on these changes the infusion of funds  
 18 recently appropriated for the FBI name check backlog  
 19 and the FBI's fee increase, USCIS will formally notify  
 20 the FBI that we will rely on their delivering results  
 21 timely so that relevant information is available  
 22 quickly. And thus effective in six months USCIS will

Page 187

1 wait no longer than six months on any case for the FBI  
 2 to finish its records check, including naturalization  
 3 cases"?  
 4 A Uh-huh. That was a proposal --  
 5 Q I haven't asked you a question yet. I'm  
 6 sorry.  
 7 Is it true that CIS has proposed not to  
 8 wait longer than six months for the FBI to finish a  
 9 name check with respect to naturalization  
 10 applications?  
 11 A CIS considered whether or not that was a  
 12 viable alternative. It was a proposal that was laid  
 13 out in this paper. CIS since finalized an MOU with  
 14 the FBI that recognized that the FBI was going to have  
 15 to work through its backlog. In working through its  
 16 backlog jointly we set goals for the FBI that were far  
 17 more aggressive than six months.  
 18 Q Has CIS formally notified the FBI that it  
 19 will wait no longer than six months for the FBI to  
 20 finish its records check, including for naturalization  
 21 cases?  
 22 A No, it has not. That was a proposal, you

Page 188

1 know, laid out in the body of this. It was not a  
 2 proposal that was implemented by the agency. As I  
 3 said, instead we continued discussions with the FBI  
 4 that led to an MOU that led to a plan to work off  
 5 their backlog and lead to far more aggressive  
 6 processing times than six months.

7 Q What's the date of the MOU that you just  
 8 referred to?

9 A We went through that earlier, I thought.  
 10 We got a copy of it. It's late 2007 I thought was the  
 11 date that you all referenced.

12 Q What else can you tell me, Mr. Aytes, about  
 13 this statement under bullet point 5 regarding the  
 14 proposal to tell the FBI that CIS will wait no more  
 15 than six months for it to finish its records check,  
 16 including naturalization cases?

17 A It was one option that was considered as a  
 18 way of getting the FBI's attention to the problem of  
 19 delays in the FBI name check issue. It was -- you  
 20 know, like many organizations, we will think about  
 21 many things and lay out many possible proposals and  
 22 then distill through that those that make the most

Page 189

1 sense in terms of reaching our objectives.

2 Q Is CIS still considering whether to wait  
 3 longer than six months for the FBI to finish its  
 4 record check in naturalization cases?

5 MS. ONOZAWA: I object to the question to  
 6 the extent it relates to deliberations or  
 7 communications prior to when a decision has been  
 8 made.

9 A CIS is operating predicated on the MOU that  
 10 we have with the FBI that calls for them to meet  
 11 certain targets with respect to processing oldest  
 12 cases and then reach a target of, I believe, by next  
 13 summer a 30-day processing time in 98 percent of  
 14 cases.

15 Q Is there anyone else at CIS who would have  
 16 information about this document?

17 A Came from Greg's files. I'm sure you could  
 18 ask him about it when you depose him.

19 Q Besides Mr. Smith.

20 A There were a lot of folks -- you know, a  
 21 document like this has many hands. I'm sure I  
 22 contributed in some respects to various drafts of

Page 190

1 this. But again, it was just a paper that laid out  
 2 possible alternatives.  
 3 Q Did you contribute in particular to bullet  
 4 point 5 on page 2?  
 5 A I couldn't tell you. It was certainly --  
 6 there were discussions last year given the situation  
 7 at to, if we were unable to get the FBI's attention  
 8 and a reasonable solution to the problem, what other  
 9 steps we might be forced to take in order to resolve  
 10 the issue. Luckily it didn't come to those kinds of  
 11 considerations. We were able to work out a very  
 12 positive partnership with the FBI to solve the  
 13 problem.  
 14 Q You're referring to the April 2008 joint  
 15 plan?  
 16 A I'm -- yes.  
 17 Q Do you have any other information,  
 18 Mr. Aytes, about the July 2007 fee increase and the  
 19 related surge in naturalization applications that you  
 20 haven't shared with me yet?  
 21 A Only a little perspective. We currently as  
 22 of the end of May have 815,000 naturalization

Page 191

1 applications pending. We received about 340,000 so  
 2 far this year. We've worked through the vast majority  
 3 of the applications we received last year. If it  
 4 wasn't for -- let's say I had gotten 100,000 in July  
 5 instead of 460,000, which is still high. You know,  
 6 these organizations, the goals they set were 33  
 7 percent above typical demand for naturalization in a  
 8 year. If I had gotten 100,000 instead of 460,000,  
 9 that 850,000 becomes 450,000 total pending. That's  
 10 only about -- that takes you back to about August of  
 11 last year.  
 12 The surge -- it was the scale of the surge  
 13 that has significantly affected processing times. If  
 14 we had received applications at a far more typical  
 15 volume level, by the end of this year we would not  
 16 have a backlog in naturalization. We will have a  
 17 backlog, relatively small compared to the 1.4 million  
 18 that we received, but that is directly as a result of  
 19 the sheer volume of demand that was filed last year.  
 20 Q Are you familiar with the term "backlog  
 21 cycle"?  
 22 A Uh-huh.

Page 192

1 Q What does that refer to?  
 2 A In our terminology it's the way that you  
 3 calculate a backlog. That's the way we use that term.  
 4 Q What do you mean by, "the way you calculate  
 5 a backlog"?  
 6 A The way that you calculate how cases move  
 7 into the backlog.  
 8 Q Does it have any other meaning?  
 9 A I'm sure it has other meanings in other  
 10 contexts.  
 11 MR. GHACHEM: I don't have any further  
 12 questions.  
 13 MS. ONOZAWA: Okay. Can we take a break?  
 14 MR. GHACHEM: Sure.  
 15 (Recess taken.)  
 16 EXAMINATION OF MICHAEL L. AYTES  
 17 BY MS. ONOZAWA:  
 18 Q Mr. Aytes, I just have a few follow-up  
 19 questions.  
 20 You testified earlier about the surge in  
 21 July 2007 in naturalization applications, correct?  
 22 A Yes.

Page 193

1 Q And you testified that there was a plan  
 2 implemented afterwards between the CIS and FBI in  
 3 response to the surge, correct?  
 4 A There was a CIS plan to deal with the surge  
 5 that was separate and apart from the MOU entered into  
 6 with the FBI to resolve the FBI's processing of name  
 7 checks.  
 8 Q Okay. And this plan, when was that -- when  
 9 was that issued or when was that made final?  
 10 A The surge plan was completed in the fall.  
 11 We were implementing it at the time. The plan itself  
 12 had to go to the Hill because we were proposing to  
 13 take -- I believe it was around \$460 million in  
 14 additional revenue that we had received with the  
 15 additional volume of applications and invest it in  
 16 acquiring the capacity necessary to do the work. And  
 17 at that magnitude I believe it required notification  
 18 and approval by the Hill.  
 19 Q Okay. And when was this plan submitted to  
 20 the Hill or Congress?  
 21 A I believe it was submitted probably either  
 22 very late in 2007 or very early 2008. We were



Page 194

1 implementing it while we were finalizing the plan  
2 because we were early enough in the year to be able to  
3 make adjustments if necessary if Congress had concerns  
4 or issues.

5 Q Okay. And has Congress ever communicated  
6 to the agency over the last five years any mandate  
7 that naturalization applications had to be completed  
8 within a specific time frame?

9 A With backlog elimination the -- that plan  
10 that went from about 2003 through 2006 where Congress  
11 provided about \$500 million in subsidies to supplement  
12 the fee revenue because the fees simply were not  
13 keeping up with our costs, that was all predicated on  
14 a seven-month processing time for naturalization.

15 Subsequently Congress was advised through  
16 the surge plan and through various hearings where we  
17 were with respect to the surge and that our goal with  
18 the fee rule was to move to five months and that our  
19 plan was still to move to five months after we worked  
20 through the surge of applications that we received.

21 MS. ONOZAWA: All right. Thank you. I  
22 have no further questions.

Page 195

1 EXAMINATION OF MICHAEL L. AYLES  
2 BY MR. GHACHEM:

3 Q Just one brief question, Mr. Ayles. You  
4 stated -- you stated that Congress provided funding --  
5 extra funding to CIS in connection with the surge --

6 A With the -- excuse me, with the preexisting  
7 backlog elimination plan. That funding ended at the  
8 end of FY 2006.

9 Q And you stated that that funding was  
10 predicated upon a seven-month average processing time  
11 for naturalization applications?

12 A Yes, as we calculate processing times.

13 Q For what period -- over what period of time  
14 was that average processing time contemplated?

15 A That was the goal we were supposed to get  
16 to. That was our target. Processing times were  
17 significantly higher than that as they worked, you  
18 know, through. The agency had substantial backlogs at  
19 its inception. And Congress, recognizing that and  
20 recognizing that the revenue stream based on our fee  
21 structure was part of that, provided that subsidy  
22 temporarily over a course of a couple of years.

Page 196

1 The disconnect was that that funding lapsed  
2 at the end of 2006. That was always the preexisting  
3 plan. The agency should have had a fee rule --  
4 modified fee rule in place by the time that funding  
5 lapsed instead of waiting until July the following  
6 year.

7 Q Did Congress also prescribe the  
8 five-month --

9 A No.

10 Q -- processing time that you referred to  
11 earlier?

12 A Those were goals that we set and told  
13 Congress of and then told them of our plans as to how  
14 we would still get to that as we worked through the  
15 surge.

16 Q And did CIS achieve a seven-month average  
17 processing time for N-400 applications --

18 A At the end of backlog elimination, yes, we  
19 did.

20 Q When was that?

21 A 2006 -- well -- yeah, 2006. The summer of  
22 2006 we had no backlog of naturalization applications

Page 197

1 nationally.

2 Q And at any point since that time has CIS  
3 had a seven-month average processing time --

4 A We were able to maintain that until we  
5 started to see the surge in applications last summer.

6 MR. GHACHEM: Thank you. No further  
7 questions.

8 MS. ONOZAWA: I have nothing further.

9 MR. GHACHEM: Thank you very much,  
10 Mr. Ayles, for appearing today.

11 THE WITNESS: My pleasure.

12 (Signature having not been waived, the  
13 deposition of Michael L. Ayles, ended at 3:35  
14 p.m.)

Page 198

## ACKNOWLEDGMENT OF DEPONENT

I, Michael L. Aytes, do hereby acknowledge that I have read and examined the foregoing testimony, and the same is a true, correct and complete transcription of the testimony given by me and any corrections appear on the attached Errata sheet signed by me.

\_\_\_\_\_  
 (DATE) (SIGNATURE)

Page 199

## CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Rebecca L. Stonerock, Registered Professional Reporter, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 1st day of July, 2008.

My commission expires:  
 October 14, 2012

\_\_\_\_\_  
 NOTARY PUBLIC IN AND FOR  
 THE DISTRICT OF COLUMBIA

Page 200

## ERRATA SHEET

IN RE: VIRGINIA MILANES v MICHAEL CHERTOFF

RETURN BY: \_\_\_\_\_

PAGE LINE CORRECTION AND REASON

5	_____	_____
6	_____	_____
7	_____	_____
8	_____	_____
9	_____	_____
10	_____	_____
11	_____	_____
12	_____	_____
13	_____	_____
14	_____	_____
15	_____	_____
16	_____	_____
17	_____	_____
18	_____	_____
19	_____	_____
20	_____	_____
21	_____	_____

(DATE) (SIGNATURE)

Page 201

## ERRATA SHEET (Continued)

IN RE: VIRGINIA MILANES v MICHAEL CHERTOFF

RETURN BY: \_\_\_\_\_

PAGE LINE CORRECTION AND REASON

5	_____	_____
6	_____	_____
7	_____	_____
8	_____	_____
9	_____	_____
10	_____	_____
11	_____	_____
12	_____	_____
13	_____	_____
14	_____	_____
15	_____	_____
16	_____	_____
17	_____	_____
18	_____	_____
19	_____	_____
20	_____	_____
21	_____	_____

(DATE) (SIGNATURE)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x  
VIRGINIA MILANES, et al., :  
Plaintiffs, :  
vs. : Case No:  
MICHAEL CHERTOFF, et al., : 08 Civ. 2354 (LMM)  
Defendants. :

- - - - - x

Corporate Deposition of  
FEDERAL BUREAU OF INVESTIGATION  
By and through its corporate designee,  
MICHAEL CANNON  
Washington, D.C.  
Thursday, June 26, 2008  
10:43 a.m.

Job No.: 25501375  
Pages: 1 - 211  
Reporting by: Sarah M. Bickel

Page 2	Page 4
<p>1 Corporate Deposition of Federal Bureau of</p> <p>2 Investigation, by and through its corporate designee</p> <p>3 MICHAEL CANNON, taken at the offices of:</p> <p>4</p> <p>5 Weil, Gotshal &amp; Manges, LLP</p> <p>6 1300 Eye Street, Northwest</p> <p>7 Suite 900</p> <p>8 Washington, D.C. 20005</p> <p>9 (202) 682-7000</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17 Pursuant to agreement, before Sarah M.</p> <p>18 Bickel, Court Reporter and Notary Public in and for</p> <p>19 the District of Columbia.</p> <p>20</p> <p>21</p> <p>22</p>	<p>1 A P P E A R A N C E S C O N T I N U E D</p> <p>2 ON BEHALF OF THE DEFENDANTS (continued):</p> <p>3 HENRY R. FELIX, ESQUIRE</p> <p>4 DAVID M. SAMONDS, ESQUIRE</p> <p>5 Federal Bureau of Investigation</p> <p>6 Office of the General Counsel</p> <p>7 935 Pennsylvania Avenue, Northwest</p> <p>8 Room PA-400</p> <p>9 Washington, D.C. 20535</p> <p>10 (202) 220-9328</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>
Page 3	Page 5
<p>1 A P P E A R A N C E S</p> <p>2 ON BEHALF OF THE PLAINTIFFS:</p> <p>3 JACKSON CHIN, ESQUIRE</p> <p>4 ALAN LEVINE, ESQUIRE</p> <p>5 Puerto Rican Legal Defense and</p> <p>6 Education Fund, Inc.</p> <p>7 99 Hudson Street</p> <p>8 14th Floor</p> <p>9 New York, New York 10013</p> <p>10 (212) 739-7572</p> <p>11</p> <p>12</p> <p>13 ON BEHALF OF THE DEFENDANTS:</p> <p>14 KIRTI VAIDYA REDDY, ESQUIRE</p> <p>15 U.S. Department of Justice</p> <p>16 U.S. Attorney's Office</p> <p>17 Southern District of New York</p> <p>18 86 Chambers Street</p> <p>19 New York, New York 10007</p> <p>20 (212) 637-2751</p> <p>21</p> <p>22</p>	<p>1 C O N T E N T S</p> <p>2 EXAMINATION OF MICHAEL CANNON PAGE</p> <p>3 By Mr. Chin 6</p> <p>4</p> <p>5 E X H I B I T S</p> <p>6 (Attached to the Transcript)</p> <p>7 DEPOSITION EXHIBIT PAGE</p> <p>8 FBI 1 Declaration of Michael A. Cannon 13</p> <p>9 FBI 2 2/27/08 E-mail 33</p> <p>10 FBI 3 4/2/08 News Release 39</p> <p>11 FBI 4 March 2008 Business Plan 39</p> <p>12 FBI 5 4/1/08 E-mail 45</p> <p>13 FBI 6 5/5/08 E-mail 64</p> <p>14 FBI 7 Document 80</p> <p>15 FBI 8 Document 98</p> <p>16 FBI 9 12/13/02 Electronic Communication 112</p> <p>17 FBI 10 1/24/08 Memorandum 185</p> <p>18</p> <p>19</p> <p>20 (FBI Exhibits 2, 5, 6, and 10 are marked</p> <p>21 confidential and bound separately.)</p> <p>22</p>

<p style="text-align: right;">Page 6</p> <p>1 PROCEEDINGS</p> <p>2 MICHAEL CANNON</p> <p>3 having been first duly sworn, testified as follows:</p> <p>4 EXAMINATION BY COUNSEL FOR PLAINTIFFS</p> <p>5 BY MR. CHIN:</p> <p>6 Q Good morning, Mr. Cannon. My name is</p> <p>7 Jackson Chin. I'm one of the Plaintiffs for -- I'm</p> <p>8 one of the counsel for Plaintiffs in this case,</p> <p>9 Milanese versus Chertoff. My co-counsel, Alan Levine,</p> <p>10 is here. Thank you for coming today.</p> <p>11 I just wanted to start with a few basic</p> <p>12 instructions, and I'm sure you've heard this before</p> <p>13 but just to go through them quickly with you. You</p> <p>14 understand you're under oath?</p> <p>15 A Yes.</p> <p>16 Q That's right. The other thing is you must</p> <p>17 not nod your head or you must articulate a "yes,"</p> <p>18 "no," or "I don't know" so that the transcriber is</p> <p>19 reflecting your answers. If you don't know the</p> <p>20 answer, of course, I would expect you to say "I don't</p> <p>21 know" or "I don't understand your question, please</p> <p>22 repeat it." If you wish to take a break, let me know</p>	<p style="text-align: right;">Page 8</p> <p>1 named representative on the case.</p> <p>2 MR. LEVINE: You're the attorney for</p> <p>3 Mr. Cannon?</p> <p>4 MS. REDDY: On the record, yes.</p> <p>5 BY MR. CHIN:</p> <p>6 Q I just want to indicate that if you want</p> <p>7 to consult with counsel, please do so but not while a</p> <p>8 question is pending. Do you understand?</p> <p>9 A I do understand. So if there's a question</p> <p>10 that I'm not sure about, though -- I do have a</p> <p>11 question, if my answer may borderline some issues</p> <p>12 such as law-enforcement sensitive, are we saying that</p> <p>13 I cannot stop and consult with counsel before that?</p> <p>14 Q I would say that you cannot invoke that</p> <p>15 privilege. Your counsel will do that and then</p> <p>16 instruct you not to answer.</p> <p>17 MS. REDDY: But if you're not sure if</p> <p>18 revealing some privileged materials -- your answer</p> <p>19 would reveal privileged materials, then you can</p> <p>20 consult me.</p> <p>21 MR. LEVINE: You can consult with regard</p> <p>22 to the assertion of the privilege.</p>
<p style="text-align: right;">Page 7</p> <p>1 and we will try to accommodate you.</p> <p>2 Also, of course, we're looking for your</p> <p>3 truthful and honest testimony. Any answers that you</p> <p>4 can render, to the best of your knowledge, would be</p> <p>5 greatly appreciated.</p> <p>6 Now, are you on any medication currently</p> <p>7 that might affect your ability to comprehend these</p> <p>8 proceedings and to respond?</p> <p>9 A No, I'm not.</p> <p>10 Q Are you represented by counsel?</p> <p>11 A Yes, I am.</p> <p>12 Q And who would that be?</p> <p>13 MS. REDDY: Kirti Reddy with the U.S.</p> <p>14 Attorney's Office in the Southern District of New</p> <p>15 York and also --</p> <p>16 MR. FELIX: Henry Felix with the FBI.</p> <p>17 MR. SAMONDS: David Samonds, FBI.</p> <p>18 MR. LEVINE: You're all representing the</p> <p>19 witness as well?</p> <p>20 MR. FELIX: We're representing the FBI in</p> <p>21 our official capacity, yes.</p> <p>22 MS. REDDY: For the Milanese case, I'm the</p>	<p style="text-align: right;">Page 9</p> <p>1 MS. REDDY: Yes.</p> <p>2 THE WITNESS: Okay.</p> <p>3 BY MR. CHIN:</p> <p>4 Q Before coming to today's deposition, did</p> <p>5 you meet or speak with anyone in preparation?</p> <p>6 A Yes, I did.</p> <p>7 Q Who would that have been?</p> <p>8 A I spoke with my boss, Assistant Director</p> <p>9 Bill Hooton.</p> <p>10 Q Yes.</p> <p>11 A I spoke with Section Chief Dave Hardy. I</p> <p>12 spoke with my Assistant Section Chief, Jim Jaye. I</p> <p>13 spoke with one of my employees, Mark Vaughn.</p> <p>14 Q Could you elaborate as to what you mean by</p> <p>15 one of your employees? Is he within the National</p> <p>16 Name Check Program?</p> <p>17 A Yes, Mark Vaughn is within the National</p> <p>18 Name Check Program section.</p> <p>19 Q Is he within one of the dissemination</p> <p>20 units or --</p> <p>21 A Yes, he is. He works in the Name Check</p> <p>22 Program oversees in one of the dissemination</p>



Page 10

1 components of the Name Check Program.  
 2 Q Thank you.  
 3 A And I met with my counsel yesterday.  
 4 Q That's Ms. Reddy?  
 5 A Ms. Reddy and the other two gentlemen  
 6 here.  
 7 Q Is there anyone else you conferred with?  
 8 Did you speak with anyone at the director's office or  
 9 his representative?  
 10 A No, I did not.  
 11 Q In reference to the 30(b)(6) notice, we  
 12 did want to have information from the agency which  
 13 presumably would be information not necessarily  
 14 accessible or, you know, at Mr. Cannon's level. So I  
 15 ask that question because I think -- so far you've  
 16 given me the officials of people who are within the  
 17 Records Management Division that you have your  
 18 section under. But it appears you haven't asked for  
 19 information from anyone above or beyond that  
 20 division; is that correct?  
 21 A In preparation for this deposition?  
 22 Q Uh-huh.

Page 11

1 A I would say that is correct.  
 2 Q Let me ask you, did you review any  
 3 materials in preparation for today's deposition?  
 4 A Yes, I did.  
 5 Q What type of materials were they?  
 6 A I reviewed my declaration in the Milanes  
 7 case.  
 8 Q Yes.  
 9 A I reviewed the FBI's response to the DOJ  
 10 OIG report.  
 11 Q I'm sorry. The DOJ, was that the recent  
 12 audit?  
 13 A The audit report, yes. Department of  
 14 Justice --  
 15 Q The Inspector General?  
 16 A -- Office of Inspector General, OIG  
 17 report. I reviewed our responses to the OIG report.  
 18 I reviewed the documentation which laid out the  
 19 things I would be responsible for today in the  
 20 deposition, the 30(b)(6) and those issues to make  
 21 sure that I understood or had a really good idea of  
 22 the topics that were going to be discussed today.

Page 12

1 Q Okay. Did you review any previous  
 2 deposition testimony that you may have given?  
 3 A In Yakubova? I did not go back and review  
 4 the transcript of Yakubova. I did not do that.  
 5 Q All right.  
 6 A I also reviewed -- I believe it was a  
 7 supplemental -- interrogatories that were submitted  
 8 in this case that I was not required to sign off on.  
 9 So I had not seen them prior to this case. I'm  
 10 trying to think if there's anything else I reviewed.  
 11 Q Well, one of the areas that I would like  
 12 to discuss with you would be the March 2008 business  
 13 plan.  
 14 A Okay. I reviewed our business plan. I  
 15 also reviewed an EC, electronic communication,  
 16 dealing with the resubmission of the name checks for  
 17 USCIS.  
 18 Q That would have been back in 2002?  
 19 A 2002, I believe, yes, sir. I reviewed  
 20 that also.  
 21 Q Great. Let me also ask you -- now, have  
 22 you been deposed again or a time subsequent to the

Page 13

1 Yakubova deposition in any other litigation related  
 2 to the National Name Check Program and delays?  
 3 A No, I have not.  
 4 Q So this would be your second deposition,  
 5 correct, the one after the Yakubova deposition that  
 6 you gave in January?  
 7 A Relating to the Name Check Program?  
 8 Q Yes, that's right.  
 9 A Yes, sir, that is correct.  
 10 Q Thank you. Let me ask you --  
 11 MR. CHIN: I'm going to have your  
 12 declaration marked in evidence -- I'm sorry, marked  
 13 as Exhibit 1, please.  
 14 (FBI Exhibit 1 was marked for  
 15 identification and attached to the deposition  
 16 transcript.)  
 17 MS. REDDY: I just want to make a  
 18 correction. The Yakubova deposition was in December,  
 19 not January.  
 20 MR. CHIN: Thank you very much for  
 21 correcting me. I mistook it from the Hardy  
 22 deposition date. That's correct. Thank you.

<p style="text-align: right;">Page 14</p> <p>1 BY MR. CHIN:</p> <p>2 Q Let me ask you, Mr. Hardy --</p> <p>3 A Mr. Cannon.</p> <p>4 Q I'm so sorry, Mr. Cannon. That's right.</p> <p>5 I want to go over some of the -- take a look, sir, at</p> <p>6 your declaration, paragraphs 25 through 29. That</p> <p>7 would be on page 11 through 12. You identify a</p> <p>8 number of causes of delays in the name check</p> <p>9 processing.</p> <p>10 A Yes.</p> <p>11 Q Is that right?</p> <p>12 A Yes. In looking at page 11, paragraph 25,</p> <p>13 it -- the first sentence indicates that the paragraph</p> <p>14 addresses numerous factors contributed to the delays</p> <p>15 in the processing of name check requests.</p> <p>16 Q Yes. So my question to you, sir, can you</p> <p>17 identify any other sources of delay that you didn't</p> <p>18 include in the declaration?</p> <p>19 A Please give me a moment to read the</p> <p>20 paragraph.</p> <p>21 Q Sure. Please go ahead.</p> <p>22 A For the record, paragraph 25 is just one</p>	<p style="text-align: right;">Page 16</p> <p>1 you know? Would it be months, days?</p> <p>2 A No. Normally, within hours, because if</p> <p>3 something happens, it is brought to the attention of</p> <p>4 our Information Technology, IT folks.</p> <p>5 Q Right, the crackpot people -- crackshot --</p> <p>6 go right ahead.</p> <p>7 A I'm sorry?</p> <p>8 Q Go right ahead. What other delay factors</p> <p>9 can you think of besides that?</p> <p>10 A One thing, which is related to the</p> <p>11 accessibility of an FBI record in paragraph 28, if</p> <p>12 it's a paper record -- it talks about here, it may</p> <p>13 not be located locally, so we would have to reach out</p> <p>14 for it. But if it's a paper record on an open</p> <p>15 investigation or if we obtain a -- what we call a</p> <p>16 hit, which is a match to a record which is an open</p> <p>17 investigation, it requires coordination with the FBI</p> <p>18 case agents regarding what information, if any at</p> <p>19 all, we can release. So that would not cause a delay</p> <p>20 per se, but would take additional time as far as</p> <p>21 processing that name check.</p> <p>22 Q And just to clarify, when you say "FBI</p>
<p style="text-align: right;">Page 15</p> <p>1 component of the delays. So I'm going to continue to</p> <p>2 read the remaining paragraphs.</p> <p>3 Q Sure.</p> <p>4 A I've read paragraphs 25 through 29. In</p> <p>5 thinking through other possibilities, other things</p> <p>6 that may cause delays, there are a few that come to</p> <p>7 mind which weren't listed here (indicating).</p> <p>8 Q Can you tell us what those are?</p> <p>9 A One would be if, for some reason, our</p> <p>10 system, the Name Check Program went offline or we had</p> <p>11 problems with the computer systems within the FBI</p> <p>12 within the Name Check Program, that may cause a delay</p> <p>13 or the inability of my folks to process.</p> <p>14 Q Right. Is that the mainframe, the NCP, is</p> <p>15 that what you're referring to?</p> <p>16 A The Name Check Program is the mainframe.</p> <p>17 Also there is what's called the Name Check</p> <p>18 Dissemination Database, NCDD, which from time to time</p> <p>19 would have some sort of a functioning error or a</p> <p>20 glitch in the way that it is processing information.</p> <p>21 So that would cause also a delay.</p> <p>22 Q How substantial would that delay be, if</p>	<p style="text-align: right;">Page 17</p> <p>1 case agents," are you specifically talking about</p> <p>2 those in the field offices or at headquarters as</p> <p>3 well?</p> <p>4 A Mostly at field offices. I'm trying to</p> <p>5 think of if there would be instances at headquarters</p> <p>6 where we may have to go through headquarters to get</p> <p>7 the ability to perhaps release some information.</p> <p>8 It's possible, but it's mostly in the field.</p> <p>9 Q And when you say that there's a hit, a</p> <p>10 match, I assume, if I'm correct, that this would be</p> <p>11 to reach out to the case agent to then confirm</p> <p>12 whether the hit is, in fact, serious or derogatory</p> <p>13 or -- is that the process?</p> <p>14 A It may be all of the above. It could be</p> <p>15 maybe to find out more about the case.</p> <p>16 Q Or just to retrieve the record?</p> <p>17 A To retrieve the record, if we're allowed</p> <p>18 to do that. If it's pending, certainly we will</p> <p>19 discuss the information with the field agent because</p> <p>20 it could be law-enforcement sensitive, the providing</p> <p>21 of information may be to the point where we, in the</p> <p>22 Name Check Program, don't want to do anything that's</p>

Page 18

1 going to jeopardize an investigation. So we want to  
2 make sure that we work in concert with our  
3 operational folks.

4 Q So, Mr. Cannon --

5 A Hang on. You had one more point. I'm  
6 trying to remember what it was because you asked the  
7 question. I'm sorry, it slipped my mind. If I  
8 recall it, I'll bring it up.

9 Q That's fine. Just one follow-up question.

10 If you have an open investigation on a suspect or an  
11 individual, a particular named individual, would that  
12 not be found through your universal index or through  
13 your electronic database? Would that not tell you  
14 that --

15 MS. REDDY: Objection. He didn't finish  
16 the question, and it was going to be a compound  
17 question.

18 MR. CHIN: So should I restate --

19 MR. LEVINE: You can answer, if you  
20 understand it.

21 THE WITNESS: Ask the question again,  
22 please. Let me make sure I understand what you're

Page 19

1 asking.

2 BY MR. CHIN:

3 Q Sure. If there is an open investigation  
4 by the FBI on an individual, wouldn't that  
5 information be captured through the universal index,  
6 which I believe is an electronic set of database of  
7 your information?

8 MS. REDDY: Objection.

9 MR. CHIN: What's the reason?

10 MR. LEVINE: You can go ahead and answer.  
11 She's just noting an objection.

12 MS. REDDY: If you understand, you can  
13 answer.

14 THE WITNESS: Yes, UNI is an index of  
15 names. The status of a case, whether it's open or  
16 closed, is found in ACS in ECM, Electronic Case  
17 Management. Also, in my declaration is three  
18 components, UNI, Electronic Case Management -- no,  
19 Individual Case Management, I believe, and Electronic  
20 Case File. So the combination of those  
21 three -- Investigative Case Management, I'm sorry,  
22 tells you the status of a case. But regardless, if

Page 20

1 we have a pending investigation, we must reach out to  
2 the field agents to see if -- what, if anything, we  
3 can release.

4 Also, what it allows us to do is -- in

5 talking with the field agents, we can confirm that  
6 this name checker we have is actually the person  
7 named in the case. There's a possibility it might  
8 not be. That was the other point that I wanted to  
9 make.

10 BY MR. CHIN:

11 Q I was just trying to simply understand  
12 whether through an electronic database or through  
13 some electronic -- whether it's the automatic case  
14 support system or a different system within FBI,  
15 whether the name checks process, which I believe goes  
16 through batch processing and a number of other  
17 phases, whether the electronic processes would help  
18 you know automatically that an open investigation  
19 was --

20 MS. REDDY: Objection.

21 (Simultaneous conversation.)

22 THE WITNESS: Yes. My understanding is,

Page 21

1 by looking at what's in the Name Check Program under  
2 ACS, you can tell if a case is open or pending, which  
3 will allow my folks to reach out to the case agents.

4 BY MR. CHIN:

5 Q To then further get the file and to figure  
6 out what the nature of that open investigation is; is  
7 that correct?

8 MS. REDDY: Objection. Is it to  
9 get -- it's a compound question. To get the file or  
10 to figure out --

11 BY MR. CHIN:

12 Q Well, to determine the nature of the open  
13 investigation.

14 MS. REDDY: Is that the question?

15 MR. CHIN: That's my question.

16 THE WITNESS: If the case is uploaded in  
17 ECF, electronically available, my folks should be  
18 able to see what type of investigation it is. If it  
19 is pending and open, we will still coordinate with  
20 the case agents before any information is released.

21 BY MR. CHIN:

22 Q Let me return to this topic a little

Page 22

1 later. I'll ask you some additional questions.  
 2 Now, if you had additional resources and  
 3 they had been allocated in the past to the Name Check  
 4 Program, would there now be less of a name check  
 5 backlog?

6 MS. REDDY: Objection.

7 BY MR. CHIN:

8 Q You can answer. Please answer.

9 A As I understand the question, if I had had  
 10 additional resources in the past -- define resources  
 11 for me, if you would, please.

12 Q Well, maybe you can help define what  
 13 resources might be. If they had been allocated,  
 14 meaning there were commitments to such resources in  
 15 the past, however you define resources, would we have  
 16 far less of a name check backlog?

17 MS. REDDY: Again, I'll object for the  
 18 same reason.

19 THE WITNESS: We would, in my opinion,  
 20 have most likely fewer name checks pending than we  
 21 would now, if I had had resources earlier than I've  
 22 recently been able to obtain resources over the past

Page 23

1 number of years.

2 BY MR. CHIN:

3 Q And tell me what you believe what  
 4 resources those would be, in general terms, that  
 5 would have helped that -- if that had been allocated  
 6 in the past. We were talking about what we think are  
 7 resources. Can you just identify what you think are  
 8 the key resources?

9 A Mostly because the Name Check Program was  
 10 designed as a paper-based manual program, the  
 11 resources that would have made the greatest impact on  
 12 pending cases would have been additional personnel.

13 Q If additional resources had been allocated  
 14 in the past to the program, would there now be a  
 15 shorter average processing time?

16 MS. REDDY: Objection.

17 BY MR. CHIN:

18 Q Please answer that.

19 A That, in my opinion, most likely, yes,  
 20 would be the case, taking into consideration it would  
 21 not have changed the processing time going through  
 22 the batch phase because that's the electronic

Page 24

1 automated portion of the Name Check Program. It  
 2 would have made the most difference in the  
 3 dissemination phase, which is where you have folks  
 4 that actually have to review the reports and come to  
 5 conclusions.

6 Q Those are the analysts, correct?

7 A Yes, those are folks that analyze the  
 8 information. We call them research analysts.

9 Q I'm sorry.

10 A They analyze the information in the  
 11 reports -- or in the FBI files.

12 Q In the Yakubova deposition, you said that  
 13 there would be a number of contractors on board by  
 14 January of 2008. In the March 2008 business plan,  
 15 you were expecting additional contractors to be on  
 16 board by the end of March 2008. Has that occurred?

17 MS. REDDY: Objection, compound question  
 18 which was --

19 MR. CHIN: I was simply saying that, you  
 20 know -- there's just one question on the table.

21 BY MR. CHIN:

22 Q Based on the March 2008 business plan,

Page 25

1 there was an expectation of adding some contractors  
 2 to the program by March 2008. Has that occurred?

3 A Yes.

4 Q How many people, if you know, have been  
 5 added to your program?

6 A Are you referring to contractors or FBI  
 7 personnel working --

8 Q Both.

9 A Are you also referring to folks that are  
 10 allocated strictly to the USCIS portion of the  
 11 National Name Check Program?

12 Q If you want to break it down that way, we  
 13 can certainly do it that way.

14 A The reason I say that is because the  
 15 business plan -- if we're talking just about the  
 16 business plan, the business plan was focused only on  
 17 USCIS. So if I can limit my answer to that, if that  
 18 would be acceptable.

19 Q Sure.

20 A For USCIS, right now, the last I recall,  
 21 there are approximately 55 FBI personnel and about  
 22 273 contractors dedicated to processing USCIS name

Page 26

1 checks. Bear in mind, these are approximations,  
 2 mostly on the contracting side due to the fact that  
 3 on occasion a contractor will go -- leave and go to  
 4 another job. In other words, he'll resign from  
 5 employment of a contractor or there may be issues  
 6 where they're not meeting metrics and we have to  
 7 replace them, things of that nature. So these are  
 8 approximations.

9 Q But when you give me 55 and the 273, are  
 10 you talking about new hires?

11 A No, total.

12 Q Well, I was really asking about the  
 13 additional new hires that were scheduled for March of  
 14 2000 --

15 A I would have to go back -- off the top of  
 16 my head, I don't recall how many I had in December,  
 17 January. We've had contractors that came on board in  
 18 the March time frame, additional contractors, that is  
 19 correct.

20 Q Now, your plan also indicates that another  
 21 group of new contractors would also be scheduled for  
 22 the end of June of this year. Do you have a sense of

Page 27

1 how many of those have been hired?

2 A Part of those would have been included in  
 3 the 273 because as soon as we can -- the goal in the  
 4 business plan was by this date, we would have them on  
 5 board. But we do our best to get them on board as  
 6 soon as possible. So some of those would have been  
 7 part of the 273 that came on. As I recall, we've had  
 8 some contractors come on board within the last three  
 9 weeks.

10 Q Do you have a general sense of how many  
 11 numbers or how close you are in meeting those  
 12 targets?

13 A The business plan calls for 290  
 14 contractors, I believe, total for USCIS. We're  
 15 within, I would guess, about 10 or 15 of that, but I  
 16 don't have a sense now if any more came on yesterday.

17 Q Let me ask you, do you recall in your  
 18 deposition in the Yakubova case, you stated that the  
 19 law restricts the FBI from hiring its own staff and  
 20 that's why they needed to hire contractors. Do you  
 21 know what law you were referring to?

22 A That would be, as I recall, the limitation

Page 28

1 that we had set on our -- what we call FSC, Funding  
 2 Staffing Level. Each component within the bureau has  
 3 a limitation on the people that it can hire. There  
 4 are limitations on how many people come to work for a  
 5 government organization.

6 Q But do you happen to know the specific law  
 7 or statute that you believe creates such a limitation  
 8 in hiring at the FBI? If you don't know, you can  
 9 simply say you don't know.

10 A I don't know. My understanding is it's an  
 11 appropriations issue which is government wide on how  
 12 the government limits or sets the number of people  
 13 that work for it.

14 Q Do I take that to mean that if you receive  
 15 more appropriations, then you could hire more FSL  
 16 full-time staff at the FBI?

17 A The number of folks handled -- hired by  
 18 the FBI in general, and certainly that is something  
 19 that's outside of my area, but each year we submit a  
 20 budget request, the budget request includes request  
 21 for additional FSL. The FBI, in general, does that,  
 22 and that would include -- yeah, request for FSL,

Page 29

1 which would have to be approved on a yearly budget  
 2 basis.

3 Q Not to put words in your mouth, but it  
 4 sounds like if the budgeting process at FBI were to  
 5 propose the funding for more full-time staff, that if  
 6 they put that in, then presumably if they receive the  
 7 funding, you could then hire?

8 MS. REDDY: Objection. He's not here as a  
 9 legal expert or a lawyer. He doesn't know the law.  
 10 He already indicated that he's not --

11 MR. CHIN: I'll move on. That's fine.

12 BY MR. CHIN:

13 Q Let me ask you, Mr. Cannon, about the  
 14 bucket system that was something I read about in some  
 15 of the discovery.

16 A Are we moving away from my declaration at  
 17 this point in time?

18 Q We kind of weave in and out, but yes.

19 A Okay.

20 Q Let me ask you. This bucket system, I  
 21 believe, started in late 2007; is that correct?

22 A That is correct.



<p style="text-align: right;">Page 30</p> <p>1 Q And how does it function currently in  2 2008? If you could just give us a summary of what  3 the concept and the practice of the bucket system is.  4 A Sure.  5 Q Thank you.  6 A The bucket system essentially is a system  7 set up through the Name Check Dissemination Database,  8 NCDD. What that does, it limits the ability of an  9 employee to choose a name check. We -- our goal is  10 to do first in, first out. And as you have read in  11 the business plan, we have certain milestones that we  12 are meeting based upon the age of a name check.  13 So, for instance, we are -- just finished  14 working on name checks over three years old. So what  15 happens is when an employee goes to obtain a name  16 check and it's assigned through NCDD, they are  17 limited in the age of a name check that they can  18 choose. In other words, that bucket's a  19 three-year-old bucket, so all the name checks coming  20 out of that -- that they can choose are three years  21 old.  22 Q Yes.</p>	<p style="text-align: right;">Page 32</p> <p>1 MS. REDDY: Objection -- sorry, finish  2 your question.  3 BY MR. CHIN:  4 Q Is it applied across the board throughout  5 the dissemination phase or -- maybe the right way of  6 asking it is, how many people are affected by the  7 bucket system, how many employees? If you know.  8 A The number of employees, I couldn't tell  9 you how many employees. The bucket system is used in  10 parsing out work to additional customers -- other  11 customers within the Name Check Program.  12 Q Have you come across any difficulties in  13 having the bucket system, in fact, work the way you  14 want it to work or as you've just explained it?  15 A Occasionally, we'll have difficulties with  16 NCDD. I mentioned earlier that there may be delays  17 in processing name checks if NCDD drops offline or  18 there may be a glitch in the system. Occasionally,  19 there will be an issue with NCDD. Someone may be  20 able to choose a name which is not in the right  21 bucket. And we review the work being processed, and  22 we identify that quickly and go to resolve those</p>
<p style="text-align: right;">Page 31</p> <p>1 A According to the system, they should have  2 the next oldest one first. What this does is it  3 focuses the employee on working on name checks that  4 are of the age that we're working on, and it  5 also -- what it would prevent is if I was an employee  6 that had 10 out of 2003 or 2000 -- that were three  7 years old and they were complicated and I wanted to  8 do easier ones, to choose newer ones which may be  9 easier. So what it was -- is is a way for us to  10 focus the work that my employees in the Name Check  11 Program do in the dissemination phase to allow us to  12 focus our resources to meet the milestones as laid  13 out in the business plan.  14 Q So conceptionally, the bucket system is to  15 try to, if I understand what you just said,  16 prioritize the oldest cases and to get those properly  17 assigned and worked on?  18 A The bucket system is a way in which we  19 assign cases and set priorities and as far as the  20 class of cases that we're working on.  21 Q Is the bucket system applied across the  22 board or is it --</p>	<p style="text-align: right;">Page 33</p> <p>1 types of issues. But generally speaking, it's  2 working the way it's set up to work.  3 Q And this was started in late 2007,  4 correct?  5 A That is correct.  6 MR. CHIN: I'd like this marked as the  7 next exhibit.  8 (FBI Exhibit 2 was marked for  9 identification and attached to the deposition  10 transcript.)  11 BY MR. CHIN:  12 Q Would you please read this to yourself.  13 Do you recognize this particular e-mail?  14 A Yes.  15 Q Can you explain what the comment there is  16 about cherry picking and this is -- I guess this is  17 in reference to the bucket system?  18 A Cherry picking is what I mentioned earlier  19 where someone would be able to choose an easier case.  20 Q Which they're not supposed to do?  21 A Which, one, they're not supposed to do,  22 and two, it may be a case that's outside the age of</p>

Page 34

1 the cases they're working on, say, cases over two  
 2 years old or cases over three years old, things of  
 3 that nature.  
 4 Q I assume there are multiple buckets; is  
 5 that right?  
 6 A Name checks would be parsed in different  
 7 buckets depending upon the age, but they would only  
 8 have access to a certain bucket.  
 9 Q So, as you see, your e-mail was dated in  
 10 February of this year; is that correct?  
 11 A That's correct.  
 12 Q Once you became aware of this  
 13 cherry-picking problem, what did you do about it, if  
 14 anything?  
 15 A We looked at NCDD to figure out why folks  
 16 were able to pick cases that they weren't allowed to  
 17 work on. Again, I mentioned earlier that  
 18 occasionally we will get an indication that someone  
 19 is working on a case that they weren't supposed to be  
 20 working on or wasn't assigned. And we have to figure  
 21 out why that's the case, why that person would have  
 22 access to the case, because what it's doing is not

Page 35

1 allowing them to focus their resources where we need  
 2 to focus them.  
 3 Q Does that mean that the individual in the  
 4 dissemination phase is trying to take an assignment  
 5 that is not his or hers, in other words, going beyond  
 6 the bucket system or going beyond the assignment of  
 7 the oldest cases?  
 8 A Not necessarily. For some reason, NCDD  
 9 may have assigned this person --  
 10 Q NCDD is a software --  
 11 A The Name Check Dissemination Database.  
 12 Q It's a database, that's right.  
 13 A It's a oracle-based system they go to and  
 14 can get name checks assigned. I don't know for sure,  
 15 but it may be possible to assign them this case in  
 16 error. If that's the case, we would have to go back  
 17 and find out why --  
 18 Q I'm sorry, but it seems the e-mail is  
 19 suggesting human error or human decision making and  
 20 not so much a machine glitch. Is that a correct way  
 21 of looking at this issue? Is it a failure to  
 22 supervise that is the problem?

Page 36

1 MS. REDDY: Objection.  
 2 THE WITNESS: A failure to supervise -- I  
 3 don't think that's the case and I think probably  
 4 mischaracterizes it.  
 5 MS. REDDY: Which question do you want on  
 6 the table?  
 7 MR. CHIN: I'm trying to have Mr. Cannon  
 8 explain that it's beyond just the machine forces  
 9 where a case that is being, you know, a name check  
 10 case or assignment within the bucket system, how it  
 11 is possible for someone to pick and choose. In this  
 12 instance, what I believe cherry picking --  
 13 THE WITNESS: Cherry picking does mean  
 14 picking and choosing, that's correct.  
 15 BY MR. CHIN:  
 16 Q And that would be on contravention to the  
 17 general purpose of the bucket system?  
 18 A As I recall your question a few moments  
 19 ago --  
 20 MS. REDDY: I guess the issue --  
 21 THE WITNESS: Let me --  
 22 MS. REDDY: I guess we need to figure out

Page 37

1 which question he wants an answer to. There were a  
 2 couple of questions that were posed, and we need  
 3 to --  
 4 MR. LEVINE: The question that he's  
 5 recalling is whether or not there's a person involved  
 6 as opposed to a machine, a human, right?  
 7 THE WITNESS: That is not correct. The  
 8 question -- we might need to read it back. The  
 9 question you had posed, as I understood it, was --  
 10 MS. REDDY: Objection.  
 11 Let's let them ask the questions.  
 12 THE WITNESS: Okay.  
 13 MR. CHIN: Let me see if I can clarify,  
 14 and then I will move on.  
 15 BY MR. CHIN:  
 16 Q I think the question is whether a person  
 17 who is supposed to be taking on cases from the  
 18 buckets which indicate the oldest cases for a  
 19 particular year, periods of years, whether that  
 20 person is being assigned that set of bucket cases or  
 21 has the option and choice to ignore those cases in  
 22 that bucket and seek more recent cases, for example.

<p style="text-align: right;">Page 38</p> <p>1 And therefore, it's an issue of who is making that  2 choice, who is evading the bucket system itself.  3 MS. REDDY: Objection.  4 BY MR. CHIN:  5 Q Do you understand the question?  6 A Please just repeat it so I make sure I  7 answer what you're asking.  8 Q I think you said it was a machine  9 issue -- I thought you said the NCDD database was  10 where you thought the problem resided, and that  11 somehow you were trying to find out how that case  12 came to the attention of this person who was cherry  13 picking?  14 A I said it's possible for that to happen.  15 Q I see. Okay. Is it also possible for the  16 person to cherry pick on his own without the  17 machine's aid?  18 A In the past, that has been the case, yes.  19 Q So in this situation with the e-mail in  20 February, do we know whether the follow up led you to  21 discover what the actual problem was?  22 A Without having the first part of the</p>	<p style="text-align: right;">Page 40</p> <p>1 BY MR. CHIN:  2 Q You're familiar with the details of the  3 business plan, sir; is that correct?  4 A Yes, I am.  5 Q Are you involved with helping to shape the  6 plan itself?  7 A Yes, I was.  8 Q In what way were you involved?  9 A Developed the initial draft of the plan,  10 the format.  11 Q How else were you involved?  12 A I drafted a lot of what is in the plan  13 regarding the various sections.  14 Q Was anyone else at the FBI involved with  15 the drafting of the business plan?  16 A Yes.  17 Q Who would those individuals be?  18 A My boss, Assistant Director Bill Hooton;  19 our divisions operation manager, Andy Scott or Glen  20 A. Scott; my assistant section chief, Jim Jaye. I'm  21 trying to think -- those were the major players on  22 the development of the business plan.</p>
<p style="text-align: right;">Page 39</p> <p>1 e-mail, I'm not specifically sure what the issue may  2 have been.  3 Q Is it because it's redacted?  4 A It is redacted.  5 Q I will move on. Thank you for your  6 answer.  7 MR. CHIN: Can we please mark Exhibit 3.  8 (FBI Exhibits 3 - 4 were marked for  9 identification and attached to the deposition  10 transcript.)  11 BY MR. CHIN:  12 Q Mr. Cannon, I've just served you copies of  13 exhibits marked. These exhibits are the March 2008  14 FBI USCIS National Name Check Program Business Plan.  15 And I believe you said you were familiar with it  16 earlier?  17 A Yes, I am.  18 Q And then the other exhibit is a one page  19 USCIS news release dated April 2nd, 2008.  20 MR. LEVINE: Are these both Exhibit 2?  21 MR. CHIN: No, they're 2 and 3.  22 THE COURT REPORTER: No, 3 and 4.</p>	<p style="text-align: right;">Page 41</p> <p>1 Q Okay. Was there anyone at a much higher  2 level that was involved with the details of the plan  3 as well?  4 A No. The plan was developed by --  5 Q By your section?  6 A My section and the Records Management  7 Division, which is the division that my section is  8 in.  9 Q Fine. Thank you. Now, who else at the  10 USCIS or in Homeland Security was involved, if you  11 know?  12 A We provided drafts of the plan to USCIS.  13 Q Who at USCIS?  14 A I provided drafts to Mr. Greg Smith.  15 Q And just for the record, who is Greg  16 Smith?  17 A Mr. Gregory Smith is what I consider to be  18 my counterpart at USCIS. I forget -- I apologize, I  19 do forget his official title.  20 Q That's fine. We can find it. Was there  21 anyone else at the USCIS that you had contact with on  22 this plan?</p>

Page 42

1 A Patrick Lyden is a contractor that works  
2 for USCIS.  
3 Q And why would he be involved?  
4 MS. REDDY: Objection.  
5 MR. LEVINE: Go ahead.  
6 THE WITNESS: One of the components in  
7 developing the plan was to figure out or estimate --  
8 MS. REDDY: Objection. He's here to  
9 answer questions on behalf of the FBI. As to why CIS  
10 personnel would be involved in the drafting of the  
11 plan is beyond the scope of what he's here to answer.  
12 He's here to answer questions on --  
13 MR. CHIN: I disagree with that because  
14 obviously he was -- Mr. Cannon was very critical in  
15 devising the details of the plan. If he needed to  
16 discuss this with another agency and, of course, this  
17 plan involves another agency, then it's certainly  
18 relevant to what I'm trying to understand in terms of  
19 who -- what actors were involved with the specific  
20 details and issues and benchmarks, et cetera, of this  
21 plan.  
22 MS. REDDY: Okay.

Page 43

1 You can answer.  
2 THE WITNESS: Answer?  
3 BY MR. CHIN:  
4 Q Yes. There was a question about Patrick  
5 Lyden, the USCIS contractor, and why you needed to  
6 discuss the plans or the drafting of the plans with  
7 him.  
8 A Mr. Lyden deals a lot with the  
9 numbers -- when I say "numbers," numbers of name  
10 checks that are submitted to the FBI. He was  
11 instrumental in providing us information regarding  
12 the estimate of how many name checks we were to  
13 expect in the future.  
14 Q Is he the person who would supervise the  
15 contractors, the USCIS contractors that processed the  
16 name checks? Is that why he would know this  
17 particular set of information you wanted from him?  
18 A I have no idea if he supervises anybody.  
19 Q All right. That's fine. Let me ask you,  
20 sir, was this business plan a new plan or had it  
21 already been developing in the summer of 2007 or late  
22 2007?

Page 44

1 A The plan itself was a new plan that we  
2 pulled together in early 2008.  
3 Q All right. Now, when did the plan  
4 commence in implementation?  
5 A The plan, I believe, was signed in either  
6 March or April time frame. We, however, had been  
7 working toward these metrics before that.  
8 Q I mean, I understand from looking at the  
9 face of the document itself, it's indicating  
10 March 2008, correct?  
11 A Uh-huh.  
12 Q So are you saying that this is the only  
13 plan -- this is the plan, the only business plan in  
14 existence at the time, and that was what was executed  
15 in March of 2008 by the officials from USCIS as well  
16 as the FBI?  
17 A I am not sure I understand your question  
18 as far as is this the only business plan.  
19 Q Okay.  
20 A I don't understand the question.  
21 Q That's fine.  
22 MR. CHIN: Let me -- would you please mark

Page 45

1 this as an exhibit, please.  
2 (FBI Exhibit 5 was marked for  
3 identification and attached to the deposition  
4 transcript.)  
5 BY MR. CHIN:  
6 Q Mr. Cannon, do you recognize this  
7 document?  
8 A Yes, I do.  
9 Q What is it?  
10 A This document is an e-mail from me to  
11 Mr. Tim Murphy who's our Associate Deputy Director of  
12 the Bureau.  
13 Q Right. And it's dated?  
14 A Hang on.  
15 Q Sure. Do you need glasses?  
16 A No, I don't. I just need to find it on  
17 here. Looks like it's dated Tuesday, April 1st,  
18 2008.  
19 Q Now, let me draw your attention to your  
20 first line. You can read it to yourself. It seems  
21 to suggest that there is a latest version of our  
22 business plan. Does that mean to say that you have

<p style="text-align: right;">Page 46</p> <p>1 other versions of the business plan?</p> <p>2 A We had drafts of the business plan, that</p> <p>3 is correct.</p> <p>4 Q But the business plan that I put into the</p> <p>5 record earlier was marked -- I'm sorry, it was dated</p> <p>6 or labelled March 2008 and then it, of course, had</p> <p>7 the signature page. So why the discrepancy, if any,</p> <p>8 in terms of the timing of the versions or the timing</p> <p>9 of the business plan report?</p> <p>10 MS. REDDY: Objection. I don't</p> <p>11 believe -- foundation. I don't believe he's --</p> <p>12 BY MR. CHIN:</p> <p>13 Q Let me show you, sir --</p> <p>14 MR. LEVINE: If he understands the</p> <p>15 question, he can answer.</p> <p>16 BY MR. CHIN:</p> <p>17 Q Sir, you have a copy of the business plan</p> <p>18 that was put in -- was marked earlier. You'll see on</p> <p>19 the front page, in the lower right-hand corner,</p> <p>20 there's a month and a year, correct?</p> <p>21 A Yes, sir.</p> <p>22 Q What is it?</p>	<p style="text-align: right;">Page 48</p> <p>1 A It look some time for them to be able to</p> <p>2 sign off on it.</p> <p>3 Q And when you say "some time," how much</p> <p>4 time?</p> <p>5 A As I recall, weeks. Maybe a week or two.</p> <p>6 Q Do you recall when you submitted the plan</p> <p>7 for them to --</p> <p>8 A As I recall, it was about in the March</p> <p>9 time frame. For us to go back and change everything</p> <p>10 regarding -- as of March 5th -- on page 1 of the</p> <p>11 business plan, as of March 5th, 2008, we received</p> <p>12 this number name checks completed, this number</p> <p>13 processed, and this number -- those are details which</p> <p>14 gave an indication of a point in time in March. For</p> <p>15 us to every single time we went back with a draft, to</p> <p>16 change that is cumbersome and, in my review, was not</p> <p>17 significant as far as the purpose of the plan.</p> <p>18 The purpose of the plan was to give a</p> <p>19 status of where we were at a point in time and a way</p> <p>20 forward, which is what the plan does. So we</p> <p>21 submitted it and went back and forth with USCIS.</p> <p>22 They had to -- you have to talk to them through their</p>
<p style="text-align: right;">Page 47</p> <p>1 A March 2008.</p> <p>2 Q Do you see in that document any other date</p> <p>3 which would suggest that it did not -- or that it was</p> <p>4 created sometime other than March 2008?</p> <p>5 A I do not see any date in here that would</p> <p>6 indicate otherwise.</p> <p>7 Q Can you turn to the signature page? Do</p> <p>8 you see anything there that would indicate</p> <p>9 anything -- any time or date indicated there?</p> <p>10 A No, sir, I do not.</p> <p>11 Q Going back to the e-mail that we were just</p> <p>12 looking at, sir. You see this reference to this</p> <p>13 latest version of our business plan. How would you</p> <p>14 explain that reference in this e-mail?</p> <p>15 A Answer the question?</p> <p>16 MS. REDDY: If you understand it.</p> <p>17 THE WITNESS: Oh, I understand.</p> <p>18 BY MR. CHIN:</p> <p>19 Q Okay.</p> <p>20 A The business plan we developed with USCIS</p> <p>21 and submitted to them for their review and signature.</p> <p>22 Q Yes.</p>	<p style="text-align: right;">Page 49</p> <p>1 own internal channels, what they had to go through as</p> <p>2 far as being able to sign the plan. But that would</p> <p>3 be the discrepancy in why it was dated in March. And</p> <p>4 then I'm going to my associate deputy director in</p> <p>5 April for -- with the latest version of the plan.</p> <p>6 It's not efficient from a management</p> <p>7 perspective for us to change the details of this on a</p> <p>8 daily basis. So what the March 2008 did, it shows</p> <p>9 that in March 2008, at a point in time, this was the</p> <p>10 basis of the plan which we were going forward on,</p> <p>11 which is supported by the data in the plan dated in</p> <p>12 March 2008.</p> <p>13 Q Going to your -- going back to your e-mail</p> <p>14 of April 1st. I see here an attachment identified as</p> <p>15 USCIS spend plan, attachment two. We never obtained</p> <p>16 that document. What does that document describe or</p> <p>17 do, if you know?</p> <p>18 A Yes, I know.</p> <p>19 Q Can you tell us what you know?</p> <p>20 A Yes. The business plan is predicated upon</p> <p>21 a number of things that have to come together. One</p> <p>22 of those is the transfer of money or funds from USCIS</p>



Page 50

1 to the FBI. Those funds are appropriated by Congress  
2 to USCIS to reduce the FBI backlog. As a requirement  
3 for the release of the money, USCIS had to put  
4 forward a spend plan. So the office management  
5 budget and the folks in Congress who oversee -- and I  
6 don't know who they were, would, based on the spend  
7 plan, approve the money going to the FBI.

8 Q All right. And would this spend plan  
9 indicate when monies should be released, how much  
10 money should be released during the course of how  
11 much time it must be released to the FBI?

12 A The spend plan --

13 MS. REDDY: Objection, form.

14 THE WITNESS: Can we take the questions  
15 one at a time, please?

16 BY MR. CHIN:

17 Q Sure. The spend plan, did it state the  
18 amount of money that needed to be released to the FBI  
19 by giving deadlines?

20 A Yes.

21 Q And did the spend plan articulate the  
22 numbers of people and staff and resources that would

Page 51

1 need to be hired within time frames?

2 A Yes.

3 Q Would there be, in that spend plan, any  
4 so-called -- well, contingency set of factors which  
5 would allow them not to spend or distribute the funds  
6 as articulated, in other words, an alternative scheme  
7 of distribution of funds to the FBI?

8 A No.

9 Q Was there any wiggle room on how the money  
10 would be spent and how it would be distributed in a  
11 timely manner?

12 A Not to my knowledge.

13 Can I take a break and talk to my counsel  
14 for a moment? Is that possible?

15 MR. CHIN: Sure. Let's take a break.

16 (Brief recess.)

17 BY MR. CHIN:

18 Q Mr. Cannon, I'd like you to take a look at  
19 the business plan and turn to page 4.

20 A Okay.

21 Q You'll see that there is a graphic there.  
22 Can you tell me what that is?

Page 52

1 A The graphic in the business plan is there  
2 to indicate the milestones of which the business plan  
3 is designed to lay out, milestones being points in  
4 time where the FBI will complete or project to  
5 complete the name checks that are of a certain age.

6 Q Okay. Let me also point to the exhibit  
7 which was the USCIS news release. Take a look at the  
8 bottom of the page where it indicates target  
9 milestones. You'll see there a chart with completion  
10 goal and category, correct?

11 A Yes, I do see that.

12 Q Now, let me ask you, has the FBI met  
13 milestone number one, and that is to process all the  
14 three-year pending name checks by May of 2008?

15 A Milestone number one -- you're referring  
16 to the first milestone in the news release dated  
17 April 2nd, 2008.

18 Q Yes.

19 A The first milestone in the business plan  
20 was to complete everything over four years by the end  
21 of March 2008.

22 Q Let's talk about the very first milestone,

Page 53

1 which was -- I withdraw that question.

2 Let's look back at the page for graphic,  
3 which indicates the milestones. Did the FBI complete  
4 the cases that have been pending for over four years  
5 on March of 2008?

6 A Yes.

7 Q Now, would that also include the pending  
8 CIS name check requests from the rerun submission?

9 MS. REDDY: Objection. I think we should  
10 define "rerun" at this point to clarify.

11 BY MR. CHIN:

12 Q Mr. Cannon, do you know what I mean by the  
13 "rerun submission" that was submitted by the CIS to  
14 the program in late, I believe, November, December of  
15 2002, the 2.7 million cases?

16 A Yes, sir. I am familiar with that rerun.

17 Q So that's the rerun I'm referring to.

18 MR. LEVINE: Oops. Forgot that one.

19 BY MR. CHIN:

20 Q Do you know whether this milestone would  
21 include those very same cases found in the rerun  
22 submission?

Page 54

1 A Yes. It should have included the  
2 cases -- included the cases that were resubmitted in  
3 the rerun.

4 Q Okay. So you're saying that that has all  
5 been completely finished and the processing is done  
6 for all of those reruns?

7 A Yes, sir.

8 Q All the pending CIS requests four years  
9 and older?

10 A Yes. Our records show that that is the  
11 case.

12 Q So milestone number one you say is done.  
13 Now, looking at milestone number two, those are the  
14 cases that have been pending that are three years or  
15 older. They would have been finished by May of 2008.  
16 Have those been completed?

17 A Yes, sir. The FBI records indicate that  
18 those were completed. When I say "records," I'm  
19 talking about our computer system that we use to  
20 track cases in the Name Check Program, which is  
21 always, with our computer system, possibility for  
22 error here and there. But as far as I understand it,

Page 55

1 looking at our system, it indicated that we have  
2 completed those cases.

3 Q Thank you. Let me also ask you, the  
4 milestone -- the two-year milestone established for  
5 this July, do you believe that you will be able to  
6 complete the processing of all those pending cases?  
7 Given we're now kind of near the end of the month,  
8 but do you believe that that will also be reached?

9 MS. REDDY: Objection, calls for  
10 speculation.

11 BY MR. CHIN:

12 Q Did you understand my question?

13 A I understood your question, yes, sir.

14 Q Would you answer it, please, to the extent  
15 that you can?

16 A The FBI National Name Check Program is on  
17 track to meet that milestone.

18 Q If the FBI is so far meeting these  
19 milestones that are indicated in the business plan,  
20 based on the resources and all the other -- all the  
21 details in the business plan that are stated, can you  
22 tell me why you are using, I think, the system or a

Page 56

1 company called Mitre, M-I-T-R-E? My understanding is  
2 that that is a contractor or someone which will be  
3 testing a new name check system. Are you familiar  
4 with that?

5 MS. REDDY: Objection.

6 BY MR. CHIN:

7 Q Are you familiar with the fact that Mitre  
8 has been asked to look into the name check system or  
9 program? Does that name ring a bell at all?

10 A I know who Mitre is.

11 Q Yes.

12 A I know they are an organization that  
13 provides services to the government.

14 Q But you don't have specific  
15 knowledge -- or do you have any knowledge about  
16 Mitre's involvement in evaluating or making some  
17 assessment on the Name Check Program? If you don't  
18 know, then that's fine.

19 MS. REDDY: Objection as to time frame.

20 What time frame are we referring to?

21 MR. CHIN: I'm talking about the -- give  
22 me one second. Let me see if I can identify a time

Page 57

1 frame.

2 I'm going to withdraw that question  
3 or -- let me ask it in general.

4 BY MR. CHIN:

5 Q Do you know of any other consultant that  
6 the Name Check Program has hired or FBI has hired to  
7 evaluate the ways in which the Name Check Program and  
8 its processes will be improved going forward?

9 A Yes. That is laid out in the business  
10 plan as some of the things that we are doing.

11 Q Let me ask you, sir, have there been any  
12 operational changes made to the business plan?

13 A Can you define "operational changes to the  
14 business plan," please?

15 Q Actually, I think I'm quoting from your  
16 declaration -- no, I'm sorry. Let me go to the  
17 business plan itself, because I think there's  
18 language that suggests that there is -- one second  
19 here.

20 Let me withdraw the question for the  
21 moment and maybe revisit it later when I identify  
22 where that reference comes from.

<p style="text-align: right;">Page 58</p> <p>1 A Okay.</p> <p>2 Q Let me also ask you -- I had raised some</p> <p>3 questions earlier. As far as the business plan, is</p> <p>4 there any subsequent business plan or version of the</p> <p>5 plan other than what we see before us, as far as you</p> <p>6 know? This was produced by your counsel.</p> <p>7 A For the record, we're looking at document</p> <p>8 CIS006289 dated March 2008.</p> <p>9 MS. REDDY: Can we have the tabbed exhibit</p> <p>10 one? Thank you.</p> <p>11 THE WITNESS: For the record, this is</p> <p>12 FBI -- looks like Exhibit 4.</p> <p>13 There is a version of the business plan</p> <p>14 that we have in place which includes information that</p> <p>15 was deemed not suitable for public distribution. So</p> <p>16 yes.</p> <p>17 BY MR. CHIN:</p> <p>18 Q So you're saying that there is another</p> <p>19 version of the business plan. Was that developed</p> <p>20 after this plan was released to the public, the March</p> <p>21 2008 plan?</p> <p>22 A No.</p>	<p style="text-align: right;">Page 60</p> <p>1 anything from our customer whatsoever.</p> <p>2 Q Did USCIS also have access to this other</p> <p>3 version that we are talking about?</p> <p>4 A Yes.</p> <p>5 Q So they also have that other version which</p> <p>6 has areas which are not disclosed to the public,</p> <p>7 correct?</p> <p>8 A Yes.</p> <p>9 Q What is the nature of those areas, if you</p> <p>10 can help us understand --</p> <p>11 MR. LEVINE: One second.</p> <p>12 (Discussion off the record.)</p> <p>13 BY MR. CHIN:</p> <p>14 Q Mr. Cannon, I understand there is an</p> <p>15 existence of another business plan --</p> <p>16 A Yes, sir, that is correct.</p> <p>17 Q -- with confidential or otherwise</p> <p>18 undisclosable sections; is that correct?</p> <p>19 A That is correct.</p> <p>20 Q When was that completed, if you recall?</p> <p>21 A It was completed before this business plan</p> <p>22 was put into place.</p>
<p style="text-align: right;">Page 59</p> <p>1 Q And when you say that there is another</p> <p>2 version of the plan that is not deemed appropriate</p> <p>3 for release, what makes that plan or what in that</p> <p>4 plan is considered not releasable to the public? In</p> <p>5 general, what can you tell me about that plan? Do</p> <p>6 you know about that plan?</p> <p>7 A Yes, I do know about that plan.</p> <p>8 Q Did you help write that plan?</p> <p>9 A Yes, I did help write that plan.</p> <p>10 Q What about that other plan that I don't</p> <p>11 have in front of me is different from this plan? If</p> <p>12 you can just explain that.</p> <p>13 A There are some areas in the business plan</p> <p>14 which was not released that we believe, based upon</p> <p>15 some of the sensitivity of the information that we</p> <p>16 share back and forth with our customer USCIS, was not</p> <p>17 applicable or useful for public dissemination.</p> <p>18 Q Am I understanding you to say that you're</p> <p>19 withholding certain information from the customer</p> <p>20 because it wasn't relevant or --</p> <p>21 A No, sir, I'm not. USCIS signed that</p> <p>22 version of business plan. So we did not withhold</p>	<p style="text-align: right;">Page 61</p> <p>1 MR. CHIN: Okay. And we were just off the</p> <p>2 record, but I understand, Ms. Kirti, that that</p> <p>3 particular plan was produced to the plaintiffs; is</p> <p>4 that correct?</p> <p>5 MS. REDDY: That's correct.</p> <p>6 MR. CHIN: We can do that later, but I</p> <p>7 would like to have the Bates numbers --</p> <p>8 MS. REDDY: You're questioning me. Yes.</p> <p>9 MR. CHIN: I'm going to move on.</p> <p>10 BY MR. CHIN:</p> <p>11 Q Going back to this business plan that is</p> <p>12 for the public that we have in front of us, please</p> <p>13 turn to page 11. I want you to help me -- I'm sorry,</p> <p>14 not 11. It's page 12. Direct you to the two charts</p> <p>15 there, sir. Do you recognize the charts?</p> <p>16 A Yes. I do recognize the charts on page 12</p> <p>17 of the business plan before us, yes, sir.</p> <p>18 Q Can you explain, please, quickly this 29K</p> <p>19 reference naturalization name checks. Does that mean</p> <p>20 anything, 29K?</p> <p>21 A Yes, sir, it does.</p> <p>22 Q What does it mean?</p>

Page 62

1 A In looking, for the record, on page 12,  
2 the top chart is titled 29K Naturalization Name  
3 Checks, yes, sir.

4 Q What does the 29K refer to or represent?

5 A That was the approximate number at the  
6 time the business plan was developed -- the chart was  
7 developed of the naturalization name checks that were  
8 pending with the FBI that were older -- had been  
9 pending older than May 1st, 2006.

10 Q And then -- so this is the chart that I  
11 assume reflects the first benchmark of May 2008; is  
12 that correct?

13 A This particular chart is not in -- which  
14 benchmark are you referring to?

15 Q Right. The benchmark that is in the model  
16 predictions on page 4, which indicate that three  
17 years or longer that those cases will be completed by  
18 May 2008. Is there a relationship between that and  
19 this?

20 A That particular chart was not indicated on  
21 the -- the chart on page 12, the Naturalization Name  
22 Checks, was a subcomponent of the work we were doing

Page 63

1 in addition to completing the name checks greater  
2 than three years and older. If you look on page 4,  
3 you'll see the diagram which indicates the  
4 milestones, and that was not included on that  
5 diagram.

6 Q But I understand -- page 4 milestones does  
7 all refer to USCIS pending cases, correct?

8 A They refer to pending name checks  
9 submitted by USCIS.

10 Q That's correct?

11 A Yes, sir.

12 Q Here, if you look at the same chart on  
13 page 12, there is something that refers to the fact  
14 that there are 29,800 naturalization name checks  
15 older than May 1 of 2006. Have those all been  
16 completed by May 2008?

17 A Yes, sir.

18 Q And the same question for you, sir, with  
19 respect to the chart -- I am going to introduce a  
20 different exhibit for us to look at, which I think  
21 corresponds to what we were just looking at  
22 ourselves.

Page 64

1 MR. CHIN: Can we have this marked,  
2 please.

3 (FBI Exhibit 6 was marked for  
4 identification and attached to the deposition  
5 transcript.)

6 BY MR. CHIN:

7 Q Sir, do you recognize this document?

8 A Yes, I do recognize the document in front  
9 of me.

10 Q It's an e-mail from your subordinate,  
11 Mr. James Jaye, to a number of people, including  
12 yourself, correct?

13 A That is correct.

14 Q And it was dated May 5th of this year?

15 A That's correct.

16 Q Apparently has a number -- two charts that  
17 are part of this e-mail. Now, I'm looking at this  
18 chart and I --

19 A I'm assuming that the second page I'm  
20 looking at, page 2, is part of the e-mail in page 1?

21 Q Well, it is Bates-stamped consecutively,  
22 so I'm believing that is part of the same e-mail.

Page 65

1 A Okay.

2 Q Have you had a chance to look at it?

3 A Yes, sir, I have.

4 Q Tell me, it says USCIS -- the first chart  
5 on the first e-mail, USCIS Naturalization Project  
6 29K.

7 A Yes, sir.

8 Q That's the same reference what we saw  
9 earlier in that business plan?

10 A Yes, sir.

11 Q Indicates here 1,371 naturalization  
12 project cases remaining, correct?

13 A Yes, sir.

14 Q And then at the very bottom, you'll see  
15 three plus year project, 821 remaining of --

16 A Yes, sir.

17 Q What does that mean?

18 A The three year project, that goes to the  
19 next page. USCIS three year plus project.

20 Q But it does indicate 821 cases have not  
21 been closed and are remaining open; is that correct?

22 A As of May 5th, 2008.

Page 66

1 Q I see. So this May -- I'm sorry, the May  
2 benchmark that was indicated in the USCIS release --  
3 MS. REDDY: Exhibit 3?  
4 BY MR. CHIN:  
5 Q That's right. It says, "May 2008, process  
6 all name checks pending more than three years."  
7 Would it appear that you have not been able to  
8 complete that task?  
9 MS. REDDY: Objection.  
10 THE WITNESS: The benchmark on the  
11 milestones in the business plan is at the end of  
12 May 2008, all name checks over three years old will  
13 be completed. The date of this e-mail is May 5th.  
14 BY MR. CHIN:  
15 Q And so therefore, there should be a report  
16 May 30th or thereafter which should reflect that the  
17 cases that -- as of this date, May 5th, would have  
18 all been cleared and completed. Is that what you're  
19 saying? This metric, as reflected here on May 5th  
20 regarding the cases or name check requests that are  
21 pending for more than three years, 821 remaining, are  
22 you saying that by the end of that May period there

Page 67

1 should have been zero?  
2 A At the end of May, all of those  
3 remaining -- the 821 remaining that were aged over  
4 three years plus at the end of May were completed.  
5 Q I'm going to move on. I just wanted to  
6 understand what the chart signified.  
7 You know what, I have another question.  
8 I'm so sorry. Back to the chart. On the second  
9 page, there is the -- we see two lines on this chart,  
10 USCIS three year plus project. On the bottom, you  
11 have in the legend pending required daily, and then  
12 the other one actual pending daily. What does that  
13 mean in terms of understanding the chart here?  
14 A If you look at the chart, that is a chart  
15 that we use to gauge our progress in meeting the  
16 milestones. You will note that the chart for three  
17 year plus project, the chart ends on May 21st, 2008.  
18 The milestone ended at the end of May. So what we do  
19 as effective managers, we like to think, is we gauge  
20 our process, and we also set goals inhouse that are  
21 more aggressive than the milestones so we can make  
22 sure we're in a position to meet our milestones.

Page 68

1 The longest line you see, because this is  
2 in black and white, is the pending required daily to  
3 reach our milestones of getting rid of the three year  
4 plus project by May 21st, 2008. And the actual  
5 pending daily is the line below that.  
6 Q Which is the 821 --  
7 A Which is the 821. So you can see from  
8 that that we were well ahead of schedule and below  
9 what it was going to take for us to reach our  
10 internal goal of May 21st, 2008, which allows us to  
11 make any adjustments we need to as managers to  
12 process and be where we need to be as far as the  
13 milestones are concerned.  
14 Q Thank you, sir. Now, let me ask you also,  
15 on the business plan at page 4 --  
16 A This is FBI Exhibit 4?  
17 Q That's correct. I believe that is where  
18 the reference we were looking at before. It states  
19 that "operational adjustments required to meet  
20 projected goals." In essence, if you would read that  
21 particular paragraph. Do you see that?  
22 A Yes, sir. Please give me a moment to

Page 69

1 read.  
2 Q Yes, please do.  
3 A Okay.  
4 Q So the question is, what do we mean here  
5 by operational adjustments that would require you to  
6 report those to the executive management?  
7 A If we had to make any adjustments from an  
8 operational perspective, whether that be obtaining  
9 additional contractors to work on it, to work on the  
10 pending name checks to make sure that we met the  
11 goal, things of that nature that would affect our  
12 ability to meet the milestone. Which is why, going  
13 back to Exhibit 6, you can see we track where we are  
14 on a routine basis to make sure that if there are any  
15 issues that indicate that we are not on track of  
16 where we need to be, we can dig down and find out  
17 what those issues may be.  
18 Q And you have not reported -- there has  
19 been no need to report any adjustments; is that what  
20 you --  
21 A Not that I recall, no, sir.  
22 Q If you had to report these operational



<p style="text-align: right;">Page 70</p> <p>1 adjustments, who would you speak to in executive 2 management? 3 A Greg Smith. Mr. Gregory Smith. 4 Q That's at USCIS? 5 A At USCIS. 6 Q When we say "executive management," who 7 are we referring to here in this business plan? 8 A To USCIS executive management. I would 9 speak to Greg Smith. 10 Q And who else? 11 A And -- more than likely I would just speak 12 to Greg Smith, and he would raise it to his 13 management, I assume, on their part. 14 Q Would you not have any executive 15 management on the FBI side that you would have to 16 alert or communicate with? 17 A I would communicate this to my boss. 18 Q Mr. Hooton? 19 A Mr. Hooton, and he would more than likely 20 indicate it to Associate Deputy Director Tim Murphy 21 who signed the business plan. 22 Q Thank you. Let me also ask you, sir, what</p>	<p style="text-align: right;">Page 72</p> <p>1 A Yes. 2 Q What would that limit be? 3 A Limit is logistics regarding the space 4 that we have where our contractor's located. 5 Q Any other types of operational adjustments 6 that you have the capacity to make in order to meet 7 your goals? 8 MS. REDDY: Object to form. 9 BY MR. CHIN: 10 Q I'll rephrase the question. Let me ask 11 you -- do you understand my question? 12 A Please rephrase it. 13 Q Okay. You were saying that you have the 14 capacity to make operational adjustments to make your 15 goals and your targets. I believe I had asked 16 whether there was any limit to the number of 17 contractors you can bring on board -- 18 A Yes. 19 Q -- and then you answered it. Then my 20 question was, were there any other kinds of resources 21 that you could also engage and make that necessary 22 adjustment if needed?</p>
<p style="text-align: right;">Page 71</p> <p>1 operational adjustments would you have the capacity 2 to make? 3 MS. REDDY: Objection. 4 BY MR. CHIN: 5 Q Do you understand my question? 6 A Yes. 7 Q Okay. Can you please answer? 8 A Obtaining additional contractors or 9 putting more contractors on the process. 10 Q I understand -- is it true you have an 11 open contract for contractors -- I'm sorry. So you 12 have the authority to add additional contractors; is 13 that correct? 14 A We have the ability to obtain additional 15 contractors, yes, that is correct. 16 Q And so how many more contractors can you 17 possibly add in this adjustment if you had to? 18 MS. REDDY: Objection, speculative. 19 BY MR. CHIN: 20 Q Well, is there any limit to what type of 21 operational adjustment that you can make with respect 22 to adding new contractors?</p>	<p style="text-align: right;">Page 73</p> <p>1 MS. REDDY: Object. It's an 2 incomplete -- 3 BY MR. CHIN: 4 Q I'm asking besides contractors, what else 5 can you do to meet your operational needs? 6 MS. REDDY: Are you referring to a 7 specific time frame? 8 MR. CHIN: I'm asking him, you know, in 9 general, because he -- in this business plan, we're 10 talking about operational adjustments, and he's 11 already testified to the circumstance where they 12 might be needed in terms of -- 13 THE WITNESS: No, sir, there is no 14 circumstance presently where they are needed. 15 BY MR. CHIN: 16 Q Right. But you were just indicating that 17 if you found that you needed to add more inputs or 18 bring on adjustments to the operation in order for 19 you to meet certain benchmarks and goals, one way 20 would be to add or hire more contractors. I'm 21 asking, are there any other ways? 22 MS. REDDY: Objection. Again, it calls</p>

<p style="text-align: right;">Page 74</p> <p>1 for speculation. We don't know what issue you might</p> <p>2 be referring to --</p> <p>3 MR. CHIN: All right.</p> <p>4 BY MR. CHIN:</p> <p>5 Q For example, automation, is that an area</p> <p>6 that one can look to to help you meet your</p> <p>7 operational goals and adjustments if you had to?</p> <p>8 A Operation -- I'm sorry, automation is</p> <p>9 something that we are looking at as far as improving</p> <p>10 the system and improving the way in which we process</p> <p>11 name checks, developing -- scan the records, make</p> <p>12 them electronically available. These are things</p> <p>13 we're doing in parallel with the current system. If</p> <p>14 and when we make breakthroughs, certainly in the IT</p> <p>15 arena, then we will implement them and we will advise</p> <p>16 USCIS of any new processes that we implement to help</p> <p>17 us reach our goal.</p> <p>18 Q Thank you. Let me ask this question. If</p> <p>19 you wanted to adjust the milestones, would you add</p> <p>20 more contractors?</p> <p>21 A Right now the milestones are set in</p> <p>22 concrete.</p>	<p style="text-align: right;">Page 76</p> <p>1 congressional committees, and said this is what we're</p> <p>2 doing and everyone was in agreement. USCIS and the</p> <p>3 FBI certainly were in agreement because of the signed</p> <p>4 business plan. The Office of Management and Budget</p> <p>5 looked at this information.</p> <p>6 Q Let me ask you this way. Is there a</p> <p>7 capacity to add more space? Does this appropriation</p> <p>8 or this money in the business plan account for the</p> <p>9 need for more space so that you have more contractors</p> <p>10 who can function and work?</p> <p>11 A If you look at page 9 of the business</p> <p>12 plan --</p> <p>13 Q Yes.</p> <p>14 A -- which lays out how the 15 million</p> <p>15 dollars is going to be spent, it doesn't go into</p> <p>16 acquiring more space, physical space for contractors</p> <p>17 to go into.</p> <p>18 Q That's total investments from the USCIS.</p> <p>19 I understand in this business plan that the FBI was</p> <p>20 chipping in funds as well in order to --</p> <p>21 A Yes, sir.</p> <p>22 Q -- meet these goals?</p>
<p style="text-align: right;">Page 75</p> <p>1 Are you asking me if I wanted to move the</p> <p>2 milestones to the left, in other words, get them done</p> <p>3 quicker, would I add more contractors? Is that your</p> <p>4 question?</p> <p>5 MR. LEVINE: Or could you.</p> <p>6 BY MR. CHIN:</p> <p>7 Q Yes. And could you?</p> <p>8 A The answer is really no.</p> <p>9 Q Why not?</p> <p>10 A Because at this point in time -- a couple</p> <p>11 things. Logistically, we're close to being maxed out</p> <p>12 as far as contractors, we're running multiple shifts</p> <p>13 in my Winchester, Virginia facility. We have</p> <p>14 contractors also located in the Washington, D.C.</p> <p>15 facility. We also have other customers that we</p> <p>16 service which also have contractors. So it's</p> <p>17 limitation of space.</p> <p>18 The milestones were developed, in</p> <p>19 accordance with USCIS, in an agreement to say these</p> <p>20 are the milestones that we want to meet. We think</p> <p>21 it's aggressive, doable, reachable, reasonable, and</p> <p>22 they agreed with us. We went before Congress,</p>	<p style="text-align: right;">Page 77</p> <p>1 A Yes, sir.</p> <p>2 Q So we're only looking at page 9, which is</p> <p>3 only the CIS end of the funding picture. Are we</p> <p>4 saying that there is no money if you needed to get</p> <p>5 more space in order to expand your facilities --</p> <p>6 MS. REDDY: Objection.</p> <p>7 THE WITNESS: That's a completely</p> <p>8 different issue.</p> <p>9 (Simultaneous conversation.)</p> <p>10 THE WITNESS: -- name check, and I</p> <p>11 couldn't answer that.</p> <p>12 BY MR. CHIN:</p> <p>13 Q In other words, the capacity to increase</p> <p>14 your space needs, that is something that you can't</p> <p>15 answer; is that what you're saying?</p> <p>16 MS. REDDY: Objection as to context.</p> <p>17 BY MR. CHIN:</p> <p>18 Q Let me say it this way. If you requested</p> <p>19 more space to your superiors at the FBI, would they</p> <p>20 be able to provide the funding for the new space or</p> <p>21 the additional space in order to accommodate the new</p> <p>22 hires for whatever operational adjustment needs that</p>

<p style="text-align: right;">Page 78</p> <p>1 you would articulate?</p> <p>2 A The acquisition of space, for the record,</p> <p>3 is the management division, is handled by -- or the</p> <p>4 use of space is handled outside our division through</p> <p>5 facilities, component of the FBI. I can't answer</p> <p>6 that question.</p> <p>7 Q I understand you're going to have to ask</p> <p>8 someone in your FBI agency for that money for space,</p> <p>9 I assume; is that what you're saying?</p> <p>10 A No. How we obtain more space --</p> <p>11 Q Withdraw that question. In the thinking</p> <p>12 through of this business plan, was there not any</p> <p>13 specific thought that you would need to factor in</p> <p>14 additional space and how to go about getting it?</p> <p>15 A Our business plan was developed based upon</p> <p>16 the resources that we had in place, the space that we</p> <p>17 had available, the maximum amount of contractors we</p> <p>18 believed we could fit in that space and work in</p> <p>19 multiple shifts to maximize the efficiency of the</p> <p>20 work that we're doing.</p> <p>21 Q Okay.</p> <p>22 A Again, that's why the milestones are set</p>	<p style="text-align: right;">Page 80</p> <p>1 Q Do you understand the question?</p> <p>2 A No, because the business plan gets the</p> <p>3 name checks done in less than six months. So I'm not</p> <p>4 sure I understand.</p> <p>5 Q Well, let me identify a document for you</p> <p>6 to look at.</p> <p>7 MR. CHIN: Would you mind marking this,</p> <p>8 please.</p> <p>9 (FBI Exhibit 7 was marked for</p> <p>10 identification and attached to the deposition</p> <p>11 transcript.)</p> <p>12 BY MR. CHIN:</p> <p>13 Q Mr. Cannon, I want to draw your attention</p> <p>14 down to the second page.</p> <p>15 A For the record, I am looking at Exhibit 7.</p> <p>16 Q Yeah. This is a document that was</p> <p>17 produced for the CIS --</p> <p>18 A Produced for or by CIS?</p> <p>19 Q By CIS.</p> <p>20 A Okay.</p> <p>21 Q What I would like for you to do is to look</p> <p>22 at the second page, which has a bullet point. Number</p>
<p style="text-align: right;">Page 79</p> <p>1 into place, and that's why we had USCIS agree to it.</p> <p>2 Q Has CIS notified the FBI or yourself or</p> <p>3 anyone about not wanting to wait longer than six</p> <p>4 months for the completion of the name checks?</p> <p>5 MS. REDDY: Objection.</p> <p>6 BY MR. CHIN:</p> <p>7 Q Do you understand my question, sir?</p> <p>8 A Please restate it. I'm just trying</p> <p>9 to -- no, I don't.</p> <p>10 MR. CHIN: Can you restate the question?</p> <p>11 THE COURT REPORTER: Do you want to</p> <p>12 restate it or reread it?</p> <p>13 THE WITNESS: Can you please restate the</p> <p>14 question?</p> <p>15 MR. CHIN: I'll restate the question.</p> <p>16 BY MR. CHIN:</p> <p>17 Q Has anyone at CIS ever discussed with you</p> <p>18 or your superiors or FBI that they would want to have</p> <p>19 the processing of name check requests from CIS</p> <p>20 completed within a six-month time frame or deadline?</p> <p>21 MS. REDDY: Objection, form.</p> <p>22 BY MR. CHIN:</p>	<p style="text-align: right;">Page 81</p> <p>1 two, I believe, is where -- if you could read that to</p> <p>2 yourself.</p> <p>3 Do you see there it says, "Effective</p> <p>4 immediately for adjustment of status to permanent</p> <p>5 residents" -- I'm sorry, not that one. The sentence</p> <p>6 below, "The USCIS processing time goal for these</p> <p>7 applications is currently six months. The goal for</p> <p>8 fiscal year '08 is four months, and the goal for</p> <p>9 fiscal year '09 is three months."</p> <p>10 Is that something you have discussed with</p> <p>11 the CIS about this representation on this document?</p> <p>12 A What is the date of this document?</p> <p>13 Q Well, we don't know. We believe the</p> <p>14 document is sometime probably February or March or</p> <p>15 April of 2008, but we don't have a date to this</p> <p>16 document. We're asking whether you have -- have you</p> <p>17 had any discussions or has this ever come up, brought</p> <p>18 to your attention about these particular goals?</p> <p>19 MS. REDDY: You mean ever?</p> <p>20 MR. CHIN: These are recent -- this is a</p> <p>21 document that's quite recent.</p> <p>22 THE WITNESS: These are --</p>

<p style="text-align: right;">Page 82</p> <p>1 MS. REDDY: Objection. I'm sorry.</p> <p>2 Clarification, is your question whether this was</p> <p>3 ever -- I'm not sure what time frame your question</p> <p>4 relates to.</p> <p>5 MR. CHIN: Ever, yes.</p> <p>6 THE WITNESS: I don't understand, on</p> <p>7 page 2, in looking at the bullet two, it says, "USCIS</p> <p>8 also proposes to immediately modify its internal</p> <p>9 procedures with respect to how long it waits for the</p> <p>10 FBI's search." Then it says, "Effective immediately,</p> <p>11 for adjustment of status to permanent residents,</p> <p>12 unless the applicant is from one of the designated</p> <p>13 Special Interest Countries, USCIS will no longer wait</p> <p>14 beyond its goal processing time for the FBI's report.</p> <p>15 The USCIS processing time goal for these applications</p> <p>16 is currently six months."</p> <p>17 I don't know if they're talking about</p> <p>18 processing an application or if that's talking about</p> <p>19 the receipt of a name check. It's unclear. I can't</p> <p>20 comment on it.</p> <p>21 BY MR. CHIN:</p> <p>22 Q Fair enough. If it's not something you're</p>	<p style="text-align: right;">Page 84</p> <p>1 goal with all CIS name checks or the document we were</p> <p>2 just looking at in FBI Exhibit 7 was specific to</p> <p>3 adjustment of status name checks?</p> <p>4 Q I am not clear myself. That's why I'm</p> <p>5 asking if you know of anything related to this policy</p> <p>6 or --</p> <p>7 A No, sir.</p> <p>8 Q Thank you. Let me ask you, sir, moving</p> <p>9 on, in your declaration, you said -- you explain of</p> <p>10 the nature of the FBI and universal index, the main</p> <p>11 and reference files in your declaration on page -- at</p> <p>12 paragraphs 5, 6 and 11.</p> <p>13 A We're talking about -- I don't have the</p> <p>14 exhibit number for the declaration. It is FBI</p> <p>15 Exhibit 1.</p> <p>16 Q So 5, 6 and 11 is where you broadly lay</p> <p>17 out the definition or explanation for the universal</p> <p>18 database, the main and reference files, correct?</p> <p>19 A Please give me a chance to take a quick</p> <p>20 look at these again.</p> <p>21 Q Certainly.</p> <p>22 A Paragraph 5 on page 2, paragraph 6 on page</p>
<p style="text-align: right;">Page 83</p> <p>1 aware of?</p> <p>2 A Sorry.</p> <p>3 Q That's quite all right. But irrespective</p> <p>4 of this document, has the concept of closing out or</p> <p>5 finishing the processing of name check requests from</p> <p>6 the USCIS for a target of six months completion, has</p> <p>7 that ever been discussed?</p> <p>8 A The goal of six months has been used in</p> <p>9 the past by CIS to, in my understanding, determine</p> <p>10 how they view a backlog. In other words, anything</p> <p>11 over six months would be considered a backlog.</p> <p>12 Q When did they first indicate that</p> <p>13 definition of a backlog of six months pending?</p> <p>14 A That number has been used within the last</p> <p>15 year and a half or two years.</p> <p>16 Q Who communicated that to you, if you</p> <p>17 recall?</p> <p>18 A Janice Spasato, who's no longer with the</p> <p>19 USCIS, and I believe Greg Smith and I have also</p> <p>20 discussed it. Again, as far as the FBI is concerned,</p> <p>21 our goals are laid out in our business plan.</p> <p>22 Additionally, I have to ask you, is that a</p>	<p style="text-align: right;">Page 85</p> <p>1 3, and paragraph 11 on page 5 do describe the</p> <p>2 universal indices and universal index used by the</p> <p>3 bureau, yes, sir.</p> <p>4 Q Let me ask you, do these databases contain</p> <p>5 noncriminal information and data?</p> <p>6 A Yes.</p> <p>7 Q And could you --</p> <p>8 A If I could direct you to page 2. It says,</p> <p>9 "the Central Records System contains the FBI's</p> <p>10 administrative, personnel, and investigative files."</p> <p>11 Q Let me ask you about that. When you</p> <p>12 indicate administrative files within the central</p> <p>13 record system, what type -- could you give us some</p> <p>14 examples of the kind of files are regarded</p> <p>15 as -- which would be regarded as administrative</p> <p>16 files?</p> <p>17 A Files where it was documented where you</p> <p>18 had a group of people coming to visit the FBI, so</p> <p>19 there's a list of people that visited on a day. That</p> <p>20 may be indexed into a file.</p> <p>21 Q You mean like a guest list or a tourist</p> <p>22 that comes to do the tour?</p>

<p style="text-align: right;">Page 86</p> <p>1 A Yes. Maybe not the tour, but a list  2 created for a particular reason that would be  3 administrative in nature.  4 Q All right.  5 A Not necessarily investigative case. There  6 would be files perhaps maybe dealing with budget  7 requests. Administrative within the Bureau, the  8 internal workings of the Bureau.  9 Q So these administrative files are --  10 A They're uploaded into ACS.  11 Q Would the administrative files and  12 information also include information outside of FBI  13 or originating from outside the FBI?  14 A I don't know.  15 Q Would they, for example, include files  16 from other federal agencies?  17 MS. REDDY: He just -- objection. He just  18 answered the question.  19 BY MR. CHIN:  20 Q So you're saying you don't know exactly  21 what these administrative files contain or what type  22 of files or the kind of information that these files</p>	<p style="text-align: right;">Page 88</p> <p>1 administrative file at the FBI database in the NCP  2 program for a CIS applicant or name request?  3 A If a name in the administrative file was  4 indexed into UNI and if that same name was submitted  5 as a name check request for USCIS, then it would be a  6 hit.  7 Q Would your noncriminal files collect  8 health information on individuals, like if they're a  9 risk to the public health or something?  10 A I don't know the answer to that question.  11 When you're talking noncriminal --  12 Q I'm trying to figure out what would be  13 regarded as information you guys would collect in the  14 NNCP which have nothing to do with criminal, you  15 know, rap sheet or conviction --  16 A We don't collect information in NCP, Name  17 Check Program. Name Check Program is just a program  18 that is used to process name checks. The ACS is  19 where the files reside.  20 Q So the ACS where the files reside, is that  21 chiefly what the NNCP resorts to and uses to do the  22 searching and --</p>
<p style="text-align: right;">Page 87</p> <p>1 would reflect, is that --  2 A No, sir. I'm saying I don't know if  3 administrative files would contain information that  4 came from outside the FBI.  5 Q Okay. So as far as you know, you believe  6 that these administrative files are all FBI generated  7 from -- relating to the internal -- the things that  8 happen within the FBI? For example, you mentioned  9 guests that come visit, budgets that are  10 requested --  11 A The administrative files, to my  12 understanding, are generated in accordance with the  13 daily workings of the FBI.  14 Q Sure. Would a CIS name check that's  15 submitted have any -- would there be any bearing to  16 these administrative files, in your experience, with  17 a name check request from the CIS? Do you understand  18 the question?  19 A I'm not sure I understand the question,  20 sir.  21 Q Would there be any likelihood that a hit  22 or positive ident [sic] would result from an</p>	<p style="text-align: right;">Page 89</p> <p>1 A NCP searches the universal index UNI,  2 which is -- as explained on page four of my  3 declaration, the ACS consists of three applications,  4 Investigative Case Management, Electronic Case File,  5 and UNI.  6 Q Let me ask you, sir, does the National  7 Name Check Program have access to the NCIC terminals  8 or information in that database?  9 A The Name Check Program --  10 Q Your personnel.  11 A My personnel -- some of my personnel do  12 have access to an NCIC terminal, yes, that is  13 correct.  14 Q And is that terminal on-site in your  15 facility?  16 A Yes.  17 Q Does the National Name Check Program have  18 access to many different databases?  19 A No.  20 Q So just the Automatic Case Support  21 Database pretty much?  22 A The National Name Check Program, the</p>



<p style="text-align: right;">Page 90</p> <p>1 purpose is to provide information to the customers  2 based upon the FBI files.  3 Q Right.  4 A And the files within the FBI.  5 Q Okay. Now, tell me, what criteria are  6 used to open up a main file on a person?  7 A A main file? As explained to page 3, a  8 main entry is the subject of an investigation.  9 That's the main entry.  10 Q And --  11 A So if I robbed a bank and that was a  12 subject investigation, a file would be opened up and  13 I would be the subject. I would be the main entry in  14 that file.  15 Q If you were a witness to a crime, would  16 that also result in a main file reference -- main  17 file being opened up on you?  18 A A witness, a collaborator, as explained in  19 my declaration, would be what we term as a reference.  20 It would be referenced in my file of the  21 investigation and maybe indexed into UNI.  22 Q So what criteria would cause someone to be</p>	<p style="text-align: right;">Page 92</p> <p>1 agent or whomever in opening up a reference file or  2 creating a reference index?  3 A My understanding, when they go through  4 training, they are given guidance on how to open up a  5 file, when to open up a file, the criteria that would  6 be raised to the level to open up an investigation  7 file, things of that nature.  8 Q But do you yourself know what that  9 training or criteria used --  10 A I have not been trained in that area.  11 Q Okay. But in the course of your work and  12 in terms of the millions of name checks that have  13 come through your program, are you familiar at all  14 with some of the reference check information that may  15 come across your desk?  16 A Well, the information that comes across my  17 desk -- because I don't process the name checks, but  18 my folks that do the analysis, as mentioned in the  19 declaration, people would be referenced because they  20 were a witness or maybe a co-conspirator. There are  21 various reasons why an agent would index a name.  22 Q Have you had a hand in the development of</p>
<p style="text-align: right;">Page 91</p> <p>1 found in a reference index?  2 A As on page 5, paragraph 10, the decision  3 is discretionary, made by the special agent. If it  4 is a name which they want to index, they'll be able  5 to retrieve the information later on down the road,  6 and it would be up to them to index the name --  7 Q So then --  8 A -- as a reference. In addition to, as I  9 said earlier, an administrative record where you have  10 a list of people that came, they would be listed in  11 that record. They wouldn't be -- they would not be a  12 main record, but they would be references in that  13 record.  14 Q Do you know if there are any criteria or  15 some standards with respect to when a file would be  16 real quickly opened up or put into a reference file  17 or index? When you say -- yeah, that's my question.  18 Do you know --  19 A Can you repeat the question again, sir,  20 please?  21 Q Do you know if there are standards or  22 specific criteria that would be applied by the FBI</p>	<p style="text-align: right;">Page 93</p> <p>1 the training curriculum in the program?  2 MS. REDDY: Objection, vague.  3 What training are you --  4 BY MR. CHIN:  5 Q I'm sorry. Training of your new employees  6 in performing their duties in the Name Check Program?  7 In other words, when they perform their duties in  8 accessing the information, doing the actual name  9 checks, doing the file searches, the  10 dissemination --  11 A In the past, I reviewed the curriculum  12 from time to time as it was developed and being  13 developed.  14 Q Let me ask you again, if someone were a  15 threat to the public safety or the national security,  16 would the FBI open up a file on such a person?  17 MS. REDDY: Objection.  18 BY MR. CHIN:  19 Q Do you understand my question?  20 MS. REDDY: Calls for speculation.  21 MR. CHIN: It's actually asking if he  22 knows or he doesn't know.</p>

Page 94

1 MS. REDDY: Okay.

2 THE WITNESS: That's too broad of a

3 question for me to answer. Just because someone is a

4 threat doesn't mean they're maybe even known to the

5 FBI. So I don't know the answer to that question. I

6 can't answer it.

7 BY MR. CHIN:

8 Q Let me ask you, are you familiar with

9 letterhead memorandum?

10 A Yes, sir.

11 Q What type of information is communicated

12 in the letterhead memorandum? That would be, I

13 guess, a report that goes to your customers?

14 A Yes, sir. A letterhead memorandum is also

15 called an LHM. It is generated by my staff to

16 provide information to the customers. It could be no

17 more than something that forwards information with

18 attached copies of files. It could summarize

19 information, the majority of which can't be released

20 but can be summarized. It could refer a customer to

21 another agency. We may have information in our files

22 that was generated by another agency. We don't -- it

Page 95

1 doesn't belong to us so we don't have the authority

2 to release it, but we will refer the customer to the

3 other agency to obtain the information. So for me,

4 there are different things that could be put in an

5 LHM.

6 Q You mentioned the fact that there may be

7 information that you could not release but that would

8 in some way provide in a general manner, correct?

9 A That's correct.

10 Q Could you explain to me more specifically

11 what context or what situation would prevent you from

12 disclosing that type of information?

13 A If we had some detailed information on a

14 subject that was to the level where the details,

15 names, dates, things of that nature could not be

16 released because they were law-enforcement sensitive

17 or classified. However, if we were able to receive

18 approval from the case agent to summarize

19 saying -- in this particular case, I'll use myself as

20 an example, Mike Cannon. Mike Cannon is under

21 investigation for, you know, counterterrorism or

22 violation, things of that -- without laying out the

Page 96

1 specifics of what's in it.

2 Q Right. Let me ask you, would there be

3 more -- as another situation, would there be a

4 situation where he is known to have associations or

5 social relations with organizations that are being

6 watched or, I guess, targets of interests, so to

7 speak? Would that be --

8 MS. REDDY: Objection.

9 THE WITNESS: Can you explain the question

10 again?

11 BY MR. CHIN:

12 Q Well, short of being a terrorist, are

13 there situations where a person is, in fact, found

14 through the name search program and that a letterhead

15 memorandum is being created but that, as you were

16 saying earlier, you can't really spell out a lot of

17 specifics? What other situation, short of being a

18 terrorist, are we speaking of?

19 A Well, it's possible that we could provide

20 information saying this person's been associated with

21 other types of organizations that are deemed --

22 Q Risky?

Page 97

1 A Risky would be a good way to put it.

2 Q Okay. Now, with that --

3 A I don't know how much detail I can go into

4 here in the deposition on the record. That's all.

5 Q Well, for example, that letterhead

6 memorandum would then go back to CIS, correct?

7 A Yes, sir, that is correct.

8 Q And then they would have to determine how

9 to interpret that generalized information?

10 A The customer -- USCIS and all of our

11 customers are responsible for making any sort of

12 adjudications on the granting of benefits, or

13 whatever they do, in association with sending the

14 name check request to us. The FBI makes no

15 determinations on whether or not a benefit should be

16 granted to anyone or the person is a bad person or

17 shouldn't be let into the country, things of that

18 nature. We don't adjudicate it all.

19 Q Yes, I understand that. Let me ask you

20 about the issue or the question I have about what is

21 a search, a name search, name check search that

22 produces derogatory information or data. Can you

<p style="text-align: right;">Page 98</p> <p>1 tell me what is considered derogatory?</p> <p>2 A Derogatory could be association with a</p> <p>3 terrorist group, could be a person who robbed a bank.</p> <p>4 It could be associated with drugs.</p> <p>5 Q When you say "associated with drugs," you</p> <p>6 mean convicted --</p> <p>7 A Convicted of running drugs or associated</p> <p>8 with members of a drug gang, things of that nature.</p> <p>9 Q So short of a conviction, they can also be</p> <p>10 referenced?</p> <p>11 A Sure. Short of a conviction, yes, someone</p> <p>12 could also be referenced with derogatory information,</p> <p>13 if their association was somewhat of a derogatory</p> <p>14 manner, so to speak.</p> <p>15 Q Is there a standard that describes what</p> <p>16 derogatory information is or is not?</p> <p>17 A There is guidance in -- I believe there's</p> <p>18 guidance in the training manuals that we develop, but</p> <p>19 I don't have it in front of me.</p> <p>20 MR. CHIN: May I have this marked, please.</p> <p>21 (FBI Exhibit 8 was marked for</p> <p>22 identification and attached to the deposition</p>	<p style="text-align: right;">Page 100</p> <p>1 training materials.</p> <p>2 Q Fine. You see here it indicates the term</p> <p>3 derogatory, and there are three or four examples</p> <p>4 indicated. Would there be any other examples that</p> <p>5 you know of that would fit under this term</p> <p>6 "derogatory," as far as you know?</p> <p>7 A For the record, derogatory says, "Drugs,</p> <p>8 terrorist activities, unlawful flight to avoid</p> <p>9 prosecution, criminal offenses." Not that I can</p> <p>10 think of. These are fairly broad areas.</p> <p>11 Q Then the -- sort of looking further down.</p> <p>12 You have a heading masters -- I mean, Matters of</p> <p>13 Opinion, MOPs. And it lists two examples, I think,</p> <p>14 more than one traffic ticket, witnessed a robbery.</p> <p>15 A Document says "Matters of Opinion."</p> <p>16 Q Would they also be considered derogatory</p> <p>17 information?</p> <p>18 A According to this slide, it is not under</p> <p>19 the derogatory category.</p> <p>20 Q But in your personal knowledge, do you</p> <p>21 believe this to include the derogatory definition,</p> <p>22 these examples?</p>
<p style="text-align: right;">Page 99</p> <p>1 transcript.)</p> <p>2 BY MR. CHIN:</p> <p>3 Q I'm producing to you, sir, two pages.</p> <p>4 A Okay.</p> <p>5 Q I believe this comes from -- first of all,</p> <p>6 do you recognize this exhibit, this document?</p> <p>7 A What I'm looking at is labelled FBI</p> <p>8 Exhibit 8. It's sensitive but unclassified. It's</p> <p>9 two pages, page 24 and page 73.</p> <p>10 Q I'll be asking you some questions about</p> <p>11 page 24, actually.</p> <p>12 A Okay. Page 24.</p> <p>13 Q Do you recognize that page?</p> <p>14 A Yes, I do. It looks like it was taken</p> <p>15 from some guidance that we provide folks in training</p> <p>16 for processing name checks.</p> <p>17 Q Right. Do you believe this to be still</p> <p>18 current information used for training purposes, if</p> <p>19 you know?</p> <p>20 A As far as I know, it is. There may have</p> <p>21 been changes that I'm not aware of. Again, on a</p> <p>22 daily basis, I'm not involved in the update of</p>	<p style="text-align: right;">Page 101</p> <p>1 A Since I don't process name checks on a</p> <p>2 routine basis, I really couldn't provide an opinion</p> <p>3 on whether or not it would be considered derogatory.</p> <p>4 Q Have you ever heard the term "Matters of</p> <p>5 Opinion"?</p> <p>6 A Yes.</p> <p>7 Q What does it mean?</p> <p>8 A Opinion on whether or not it would rise to</p> <p>9 the level of reporting to the customers.</p> <p>10 Q The question is, what standards or</p> <p>11 criteria exist for such an individual to make that</p> <p>12 determination as to whether this Matter of Opinion</p> <p>13 rises to that level?</p> <p>14 A Keep in mind, these are generic training</p> <p>15 materials. Each customer can differ on what it</p> <p>16 considers to be information that it needs. We have</p> <p>17 had USCIS come out and train our folks in particular</p> <p>18 on things it is looking for as far as information it</p> <p>19 needs to make an adjudication. This is very general</p> <p>20 in nature, and I don't have access to that. That</p> <p>21 would be spelled out more so probably in those</p> <p>22 materials.</p>

<p style="text-align: right;">Page 102</p> <p>1 Q Would it be fair to say, if you know, that</p> <p>2 what is considered derogatory depends on what the</p> <p>3 customer is concerned about or looking for?</p> <p>4 A No. Derogatory -- no, I can't say that.</p> <p>5 That would change from customer to customer.</p> <p>6 Q From the FBI Name Check Program --</p> <p>7 A From the FBI Name Check Program, right.</p> <p>8 What I'm saying is what is reported to a customer, in</p> <p>9 addition to derogatory information, can change from</p> <p>10 customer to customer on what they need. And USCIS</p> <p>11 has provided training to my staff and also provided</p> <p>12 input as far as training materials on what's</p> <p>13 derogatory.</p> <p>14 Q Let me ask another question then. Would a</p> <p>15 letterhead memo be issued or be needed to report to</p> <p>16 the customer that a person has more than one traffic</p> <p>17 ticket, for example?</p> <p>18 A It could.</p> <p>19 Q Is it done, to your knowledge?</p> <p>20 A More than one traffic ticket? Are you</p> <p>21 asking if more than one traffic ticket is reported?</p> <p>22 Q Yes.</p>	<p style="text-align: right;">Page 104</p> <p>1 A For about a year and a half, I believe.</p> <p>2 Q Does he conduct some of the trainings of</p> <p>3 the new hires?</p> <p>4 A No. He is the unit chief that is over the</p> <p>5 folks that do the training of the new hires.</p> <p>6 Q So who would have trained Mr. Ford? He's</p> <p>7 only been there a year and a half.</p> <p>8 A He's had hands-on experience processing</p> <p>9 name checks. The folks that are under him would have</p> <p>10 provided him guidance on how they do their work. He</p> <p>11 also is in -- one of the folks that deal with USCIS</p> <p>12 as far as information going back and forth, as far as</p> <p>13 operational adjustments, things of that nature, on</p> <p>14 his level.</p> <p>15 Q Did you speak to Mr. Ford in preparation</p> <p>16 for today's deposition?</p> <p>17 A Not in preparation for today's deposition,</p> <p>18 no, sir.</p> <p>19 Q Now, USCIS is one of the many customers</p> <p>20 that the National Name Check Program serves; is that</p> <p>21 right?</p> <p>22 A That is correct.</p>
<p style="text-align: right;">Page 103</p> <p>1 A I don't know.</p> <p>2 Q Or has witnessed a robbery, would that be</p> <p>3 sufficient basis for issuing a letterhead memorandum</p> <p>4 to the customer?</p> <p>5 MS. REDDY: Objection.</p> <p>6 Are you referring to CIS or --</p> <p>7 MR. CHIN: Yes.</p> <p>8 THE WITNESS: If that type of information</p> <p>9 is information that is wanted by USCIS, then it could</p> <p>10 be conveyed to USCIS in a letterhead memorandum.</p> <p>11 BY MR. CHIN:</p> <p>12 Q Do you know, in fact, that is the</p> <p>13 information that CIS wants?</p> <p>14 A I do not know that.</p> <p>15 Q Who would know that?</p> <p>16 A Folks on my staff would know that.</p> <p>17 Q Who particularly would know that?</p> <p>18 A My unit chief, Gabriel Ford.</p> <p>19 Q Who?</p> <p>20 A Gabriel Ford, my unit chief.</p> <p>21 Q How long has Mr. Ford been with the</p> <p>22 program?</p>	<p style="text-align: right;">Page 105</p> <p>1 Q Now, do some of your customers require</p> <p>2 only checks in the main file and not in the reference</p> <p>3 files?</p> <p>4 A No. The National Name Check Program does</p> <p>5 name checks for our customers, searches UNI, mains,</p> <p>6 and references for all the customers.</p> <p>7 Q I'm sorry. That says to me -- I didn't</p> <p>8 hear correctly. You're saying including reference</p> <p>9 checks?</p> <p>10 MS. REDDY: Objection. Can you --</p> <p>11 BY MR. CHIN:</p> <p>12 Q All customers get main checks, UNI checks</p> <p>13 and reference checks?</p> <p>14 A No. There's a -- you've misstated the</p> <p>15 checks.</p> <p>16 Q You said it so quickly, I didn't catch it.</p> <p>17 My apologies.</p> <p>18 My question initially was, do all or do</p> <p>19 some of your customers not require more than just a</p> <p>20 main file check?</p> <p>21 A No.</p> <p>22 Q So presumably, when they ask for their</p>

<p style="text-align: right;">Page 106</p> <p>1 name checks to be processed, you automatically</p> <p>2 process them through every single -- from the</p> <p>3 universal to the main files and then to the reference</p> <p>4 files; is that what you're saying?</p> <p>5 A All name checks are processed the same, an</p> <p>6 initial batch run that checks the universal index,</p> <p>7 universal indices, and those names in UNI can be</p> <p>8 associated as a main entry on a file or a reference</p> <p>9 entry on the file. So it's the same across the board</p> <p>10 for all the customers.</p> <p>11 Q If the NFL (phonetic) submitted a special</p> <p>12 request for their name checks to get through, you</p> <p>13 know, and it's probably within a very short time</p> <p>14 frame, would they also be subject to that type of</p> <p>15 name check process, including reference file checks?</p> <p>16 A Yes, sir.</p> <p>17 Q Would there be any -- in your experience</p> <p>18 or to your knowledge, have any of those checks ever</p> <p>19 required a year or two or more in terms of trying to</p> <p>20 get the reference checks processed?</p> <p>21 A I don't know.</p> <p>22 Q Let me ask you, sir, are you aware of any</p>	<p style="text-align: right;">Page 108</p> <p>1 Q You're familiar with the EC?</p> <p>2 A I'm familiar with the EC.</p> <p>3 Q But I may have to show you the actual</p> <p>4 report or memo itself. So you're aware of that</p> <p>5 instance in 2002. Are you aware of any other</p> <p>6 instances?</p> <p>7 A I'm not aware of any instance where I</p> <p>8 personally saw derogatory information being passed</p> <p>9 solely as a reference file, solely as a reference to</p> <p>10 the name check.</p> <p>11 Q Do you know whether a name check reference</p> <p>12 file has ever resulted in the denial of an</p> <p>13 immigration benefit, including naturalization?</p> <p>14 A That is something for USCIS to answer. I</p> <p>15 do not know. Again, USCIS are the ones that would</p> <p>16 grant the benefits or deny the benefits. We have</p> <p>17 nothing to do with that.</p> <p>18 Q If this type of derogatory information</p> <p>19 comes up as in --</p> <p>20 MS. REDDY: Can we take a break before we</p> <p>21 continue?</p> <p>22 MR. CHIN: Sure.</p>
<p style="text-align: right;">Page 107</p> <p>1 instance when the name check search of the reference</p> <p>2 files was the sole source of derogatory information?</p> <p>3 A I recall it was alluded to in the EC back</p> <p>4 in 2002.</p> <p>5 Q When you say the EC, what do you mean by</p> <p>6 that?</p> <p>7 A Electronic communication in 2002, which I</p> <p>8 reviewed in preparation for my deposition, which</p> <p>9 talked about the resubmission of the name checks. In</p> <p>10 that EC, they talked about derogatory information</p> <p>11 being listed in a reference file.</p> <p>12 Q Are you familiar with an internal FBI memo</p> <p>13 that went to the director in December of 2002?</p> <p>14 A I believe that is -- without having it in</p> <p>15 front of me, that sounds like that is --</p> <p>16 Q So that's not an EC. It's not an</p> <p>17 electronic communication, it's actually a separate</p> <p>18 paper memo that --</p> <p>19 A I believe it's an electronic</p> <p>20 communication.</p> <p>21 Q Perhaps it's both.</p> <p>22 A Okay.</p>	<p style="text-align: right;">Page 109</p> <p>1 (Discussion off the record.)</p> <p>2 BY MR. CHIN:</p> <p>3 Q I'm trying to ask whether or not you are</p> <p>4 aware of any kind of a very serious situation where a</p> <p>5 name check from the reference file investigation has</p> <p>6 led to, you know, this information being so serious</p> <p>7 and derogatory that it had to be reported to someone</p> <p>8 higher up in the food chain in law enforcement, for</p> <p>9 example?</p> <p>10 MS. REDDY: Objection.</p> <p>11 THE WITNESS: I have no idea what you're</p> <p>12 asking me.</p> <p>13 BY MR. CHIN:</p> <p>14 Q Give me one second. You are aware of the</p> <p>15 EC communication regarding the 2002 incident. I was</p> <p>16 trying to figure out if you knew of any other</p> <p>17 incidents. Is it fair to say you don't know?</p> <p>18 MS. REDDY: Objection.</p> <p>19 I'm not sure what the question was.</p> <p>20 BY MR. CHIN:</p> <p>21 Q Do you understand my question, Mr. Cannon?</p> <p>22 A No, sir, not completely. Sorry.</p>



Page 110

1 Q I had originally asked -- the question was  
2 whether the name check process through reference  
3 files is ever -- as a sole search, has it ever led to  
4 derogatory information, and your response was that  
5 you understood that in 2002 there was such an  
6 instance -- you were not there, you were not employed  
7 yet, but you've seen it in preparation for this  
8 deposition --

9 A Yes, sir.

10 Q I'm just simply asking, do you know, in  
11 your experience working there as the head of the  
12 program, have you seen any other similar  
13 instances --

14 A I have not physically seen any other  
15 instances.

16 Q Have you heard of similar instances?

17 A I understand the derogatory information  
18 based on reference files this past two customers.  
19 That's about all I know.

20 Q I'm sorry?

21 A That's about all I can say on that point.

22 Q That's fine.

Page 111

1 MR. CHIN: Shall we take a break for  
2 lunch?

3 MS. REDDY: Yes.

4  
5 (Whereupon, at 1:12 p.m., the deposition  
6 was recessed to reconvene at 1:45 p.m. that same  
7 day.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

Page 112

1 AFTERNOON SESSION

2 (1:54 p.m.)

3 Whereupon,

4 MICHAEL CANNON

5 having been previously duly sworn, was further

6 examined and testified as follows:

7 EXAMINATION BY COUNSEL FOR THE PLAINTIFFS

8 BY MR. CHIN:

9 Q Mr. Cannon, just to follow up with a few

10 other questions on that topic we were on before.

11 A Could you please refresh my memory on what  
12 the topic was, please? Thank you.

13 Q I was asking about the type of derogatory  
14 information that might arise comparable to the 2002  
15 incident that you referred to, not we understand to  
16 mean the -- can you explain what you know about that  
17 incident? Lay that down in the foundation.

18 A Sure.

19 Q Would it help if I -- let me show this  
20 document to you.

21 (FBI Exhibit 9 was marked for  
22 identification and attached to the deposition

Page 113

1 transcript.)

2 BY MR. CHIN:

3 Q Mr. Cannon, please take a look at this  
4 document. Do you recognize it or has someone shown  
5 this to you? It's dated December 13th, 2002.

6 A For the record, I'm looking at FBI  
7 Exhibit 9, which was a memorandum -- we call it an  
8 EC, electronic communication.

9 Q Oh, this is what an EC is?

10 A It's uploaded.

11 Q EC meaning electronic communication, as  
12 you were saying before?

13 A Electronic communication. Dated December  
14 13th, 2002. I am familiar with it, yes, sir.

15 Q And that was drafted by someone you know?

16 A Robert Garrity.

17 Q Is he currently in the Records Management  
18 Division?

19 A No, he's not.

20 Q Oh, he's not?

21 A No.

22 Q Where did he go?

Page 114

1 A He left and went to a position in the  
2 field. A position in the field. He's an agent.  
3 Q But he's still within the FBI, as far as  
4 you know?  
5 A Yes, sir.  
6 Q Do you know when he left, what year?  
7 A It was before I got to Records Management.  
8 Q So that would --  
9 A And I arrived in 2005. He left Records  
10 Management Division prior to that.  
11 Q Thank you for clarifying that.  
12 So this document, you have looked at it  
13 before?  
14 A Yes, sir.  
15 Q And can I turn you to the second page, ask  
16 you to look at the second page. You'll note in the  
17 middle subheading, it's Missed Name check?  
18 A Yes, sir.  
19 Q So earlier when you were talking about the  
20 2002 name check that caused a lot of concern, would  
21 that have been this particular case that you were  
22 referring to?

Page 115

1 A Yes, sir.  
2 Q What do you know about this particular  
3 individual that apparently was not found in the NCCP  
4 initial check? Do you know anything more?  
5 A I remember talking to him -- no, I never  
6 had a conversation with this gentleman. I discussed  
7 this with Dave Hardy, who had the program before me.  
8 I don't specifically recall the type of information  
9 that we had on this person, but apparently, according  
10 to the CC, there was information in a reference  
11 concerning the individual which was of concern that  
12 was not -- apparently not found, according to the EC.  
13 Q Right. If you know, speaking on behalf of  
14 the agency, do we know -- or do you know rather,  
15 whether this individual was ever arrested, prosecuted  
16 or denied naturalization or --  
17 A I'm sorry. I don't know. You'd have to  
18 go to USCIS or INS to find the actual result of the  
19 adjudication of --  
20 Q Is it the position of the FBI that there  
21 was no follow-up communication regarding this  
22 individual's fate?

Page 116

1 A No, I'm sorry. There was follow-up  
2 communication. Forgive me. I did not discuss that  
3 particular item with Mr. Hardy. I cannot tell you  
4 the final result of this individual.  
5 Q Has there been anything similar or  
6 comparable after 2002, in your experience at the  
7 National Name Check Program, where a check found an  
8 individual or suspect of this caliber of national  
9 security threat or potential national security risk,  
10 let's say?  
11 MS. REDDY: Objection for form.  
12 BY MR. CHIN:  
13 Q Have you -- during the course of your  
14 employment, have you any knowledge of anyone that the  
15 Name Checks Program has identified that would be  
16 similar to the national security risk that this  
17 individual seemed to have raised as a question?  
18 A I don't, but I do not get involved in the  
19 results of -- once a name check leaves the Bureau,  
20 it's up to USCIS. If they choose to make a  
21 determination based on our information or whatever,  
22 that's their determination.

Page 117

1 Q I'm still looking at what happens within  
2 the FBI as, you know, in terms of who, if upon  
3 getting this information, who would get it and who  
4 would report it and to whom would it go to if this  
5 were to arise?  
6 So in other words, someone on your staff,  
7 an analyst, presumably, if they come up against this  
8 derogatory information through the reference checks,  
9 they would, I assume -- or correct me, they would  
10 either issue a letterhead memorandum or they would  
11 contact someone of responsibility within your  
12 program; is that correct?  
13 A Can you explain what you mean contact  
14 someone of responsibility of my program?  
15 Q If the issue is how to communicate some  
16 information of urgency or importance, how would that  
17 be done?  
18 A The name check analyst that reviews  
19 information would report the results to USCIS, the  
20 results could be derogatory. It could not be -- rise  
21 to the level of derogatory, but nonetheless, the  
22 results would be reported, as far as the routine

<p style="text-align: right;">Page 118</p> <p>1 process with the reporting information to USCIS.</p> <p>2 Q So in other words, I understand you're</p> <p>3 saying you don't get involved with the results you're</p> <p>4 saying, correct?</p> <p>5 A We do not -- once the information leaves</p> <p>6 the National Name Check Program and goes to the</p> <p>7 customer, my involvement regarding that particular</p> <p>8 name check, my section's involvement, the National</p> <p>9 Name Check Program, is complete, unless they feel</p> <p>10 they need additional information or additional data</p> <p>11 and they come back to us. But other than that,</p> <p>12 we --</p> <p>13 Q But have there been -- for example, a very</p> <p>14 serious piece of information that was derogatory and</p> <p>15 that came to the attention of your analyst and/or the</p> <p>16 supervisors, what would they do with that information</p> <p>17 do you think?</p> <p>18 MS. REDDY: Objection.</p> <p>19 BY MR. CHIN:</p> <p>20 Q In other words, if there was a national</p> <p>21 security risk identified, what would be the proper</p> <p>22 procedure within the National Name Check Program, if</p>	<p style="text-align: right;">Page 120</p> <p>1 MR. CHIN: Could we have his answer</p> <p>2 repeated?</p> <p>3 (The reporter read the requested portion</p> <p>4 of the record.)</p> <p>5 THE WITNESS: If derogatory information is</p> <p>6 discovered in the analysis of the files, that</p> <p>7 information is provided to USCIS as a customer.</p> <p>8 BY MR. CHIN:</p> <p>9 Q At the end of the process?</p> <p>10 A At the end of the process, that is</p> <p>11 correct. We provide our final result to USCIS.</p> <p>12 Q I understand that completely. I'm not</p> <p>13 really talking about the transfer point of</p> <p>14 information between Name Check Program and CIS. I'm</p> <p>15 still looking at what happens within the Name Check</p> <p>16 Program itself and/or the agency, the FBI itself.</p> <p>17 A The purpose of the Name Check Program is</p> <p>18 to not alert components of the Bureau on information</p> <p>19 that they already have, because the information is</p> <p>20 derived from the Bureau itself.</p> <p>21 Q I see. It's starting to make more sense.</p> <p>22 A Okay.</p>
<p style="text-align: right;">Page 119</p> <p>1 you know?</p> <p>2 A The information would be provided to</p> <p>3 USCIS.</p> <p>4 Q To the customer?</p> <p>5 A To the customer, that is correct.</p> <p>6 Q Would that information go to anyone else</p> <p>7 besides the customer?</p> <p>8 A If the information -- if it required us to</p> <p>9 reach out to a case agent, then we would do that, if</p> <p>10 it was a pending case. The information derogatory</p> <p>11 would come from the FBI files, which would mean they</p> <p>12 would be investigative files which would mean the</p> <p>13 operational component of the FBI would already be</p> <p>14 working on whatever issue would be existing.</p> <p>15 Q Help me understand what you just said.</p> <p>16 Would you be saying that if there was, in fact, an</p> <p>17 open investigation that a field agent or a FBI case</p> <p>18 agent was working on, that there would be already</p> <p>19 some other information that could be obtained through</p> <p>20 some other database or --</p> <p>21 A No, sir, that's not what I'm saying.</p> <p>22 Q What did you say?</p>	<p style="text-align: right;">Page 121</p> <p>1 Q Let me see if I have another follow-up to</p> <p>2 that question.</p> <p>3 If there is derogatory information</p> <p>4 disclosed -- or discovered, rather, that rises to the</p> <p>5 level of a national security risk, that information</p> <p>6 should already exist with the FBI through some other</p> <p>7 division and through some other process outside of</p> <p>8 the National Name Check Program; is that correct?</p> <p>9 A Well, the other division -- what I'm</p> <p>10 referencing is the other division or operational</p> <p>11 component are the ones that actually opened up the</p> <p>12 investigation which created the file and the name,</p> <p>13 which was indexed into Universal Indices which were</p> <p>14 then discovered when the National Name Check Program</p> <p>15 did the search on the name.</p> <p>16 Q But we don't know of any specific examples</p> <p>17 after 2002 where such a person who was -- such a</p> <p>18 person's name is searched through the reference files</p> <p>19 and it turned out they were a national security risk;</p> <p>20 is that correct?</p> <p>21 A I specifically don't get involved in that</p> <p>22 portion of it. My folks review files that relate to</p>

Page 122

1 counterterrorism, counterintelligence, criminal  
 2 files, and information that is derogatory and  
 3 pertinent in those types of files are provided to  
 4 USCIS. It's quite possible the only thing we had is  
 5 a reference file, that's quite possible, but I don't  
 6 keep track of each name check as far as that --  
 7 Q Is there any internal audit that takes  
 8 place on the usefulness -- or rather, the performance  
 9 of the National Name Check Program with respect to  
 10 identifying or detecting individuals that might have  
 11 national security risk potential?  
 12 MS. REDDY: Objection.  
 13 BY MR. CHIN:  
 14 Q Do you understand the question?  
 15 MS. REDDY: A number of terms in there  
 16 were vague. Performance, national security  
 17 potential --  
 18 MR. CHIN: Let me ask Mr. Cannon.  
 19 BY MR. CHIN:  
 20 Q Do you understand what I was asking?  
 21 A I'm not sure I understand what you're  
 22 asking.

Page 123

1 Q The National Name Check Program has been  
 2 in existence for -- I guess it's been ten years,  
 3 correct, at least?  
 4 A Over that. The Bureau check and name  
 5 checks goes back to -- it was in my declaration, back  
 6 to the Eisenhower administration.  
 7 Q Now, you've been the head of the program  
 8 since, I believe, March or the middle of 2005?  
 9 A March 2005, yes, sir.  
 10 Q So if there had been an agency decision to  
 11 make some kind of an audit or internal evaluation of  
 12 how your program was able to find persons of great  
 13 interest whose derogatory information is being  
 14 discovered through this process, would you know about  
 15 it or --  
 16 A I would know about that, yes, sir. I  
 17 would know about it.  
 18 Q So, in other words, do you know if that's  
 19 ever been done?  
 20 A If you're asking have they -- has the  
 21 Bureau ever --  
 22 Q Initiated such an audit or assessment.

Page 124

1 A To see if there are folks with which we  
 2 have derogatory information that are a national  
 3 threat; is that what you're asking?  
 4 Q Public security, national security, public  
 5 safety threat.  
 6 A No. We provide the information to the  
 7 customer, and it could be derogatory in the area of  
 8 counterintelligence, counterterrorism, criminal. No,  
 9 sir, we never produced such a -- such a study has  
 10 never been done.  
 11 Q Have you or the FBI agency had any  
 12 discussions with Homeland Security or USCIS about  
 13 implementing a risk-based process to reduce the  
 14 backlog, for example?  
 15 A Can you define what "risk-based" means?  
 16 Q Well, I am not, of course, the expert on  
 17 risk-based, but that's sort of where I understand  
 18 that that is sort of a term used when -- it certainly  
 19 has come up with some of the, I believe, assessments  
 20 that the agency has had in the past in reports. And  
 21 maybe congressmen have asked about it, and certainly  
 22 the Ombudsman has said that there should be some way

Page 125

1 to develop a risk-based approach to implementing or,  
 2 rather, doing the name checks in your program.  
 3 A Risk-based, what particularly are you  
 4 referring to?  
 5 Q Are you familiar with the Ombudsman  
 6 report --  
 7 A I did read the Ombudsman report.  
 8 Q I believe in the last two years they've  
 9 been recommending that the FBI and the Name Checks  
 10 Program conduct some sort of approach that would  
 11 evaluate and incorporate risk-based approaches to the  
 12 work, and that would hopefully, in fact,  
 13 significantly reduce the backlogs. I believe that's  
 14 the proposal, if I'm not mischaracterizing it.  
 15 Do you recall reading about it or hearing  
 16 about the Ombudsman referring to that recommendation?  
 17 A That sounds familiar.  
 18 Q Was that discussed at your level at all  
 19 when that recommendation came out?  
 20 A First of all, the Ombudsman report wasn't  
 21 a recommendation to the FBI. I remember reading the  
 22 report when it came out. As far as risk-based, that

Page 126

1 was the basis of some of the filters that we've  
2 looked at as far as reducing the workload with the  
3 files with USCIS.

4 Q And you're talking about the mega filter  
5 and super filter?

6 A Yes, sir, that's correct.

7 Q And those were filters or programs that  
8 were put into place in what year?

9 A The mega filter was in the fall of last  
10 year, and the super filter, if I recall, maybe mid  
11 part of last year. We're talking 2007.

12 Q Correct me if I'm wrong. I understand  
13 that the filtering is some sort of technological way  
14 of eliminating certain classifications of records or  
15 files from the batch process; is that correct?

16 A From the --

17 Q The initial batch electronic process.

18 A The mega filter, yes, was designed to  
19 eliminate files that would not need to be looked at  
20 beyond the batch process. And the super filter, when  
21 it was originally designed, was something that was  
22 used in NCDD, National Name Check Dissemination

Page 127

1 Database, which means it would have been at the point  
2 after the batch process where those would have been  
3 looked at. But in both cases, they were designed to  
4 help alleviate the load or the requirements of the  
5 analyst as far as having to go through material.

6 Q And just to educate me a little bit, the  
7 kinds of -- the classifications of files which are  
8 now eliminated from the USCIS name check requests,  
9 would those -- can you help me understand what type  
10 of information would now be excluded from that  
11 search?

12 MS. REDDY: Objection. The answer would  
13 require information that's protected under the law  
14 enforcement privilege.

15 MR. LEVINE: What was the question again?  
16 Can you read it back, please?

17 (The reporter read the requested portion  
18 of the record.)

19 BY MR. CHIN:

20 Q Meaning the mega filter that you were just  
21 talking about.

22 A Yes, sir.

Page 128

1 Q Do you know what types of files are now no  
2 longer needed in terms of searching, you know, under  
3 the customer's request the name searches that are  
4 supplied?

5 MS. REDDY: I'm objecting and asking him  
6 not to answer.

7 MR. FELIX: Actually, he can answer that  
8 one, whether he knows or not.

9 MS. REDDY: Okay.

10 THE WITNESS: Yes. I know the type of  
11 files.

12 BY MR. CHIN:

13 Q Can you tell us what type of files --

14 MS. REDDY: Objection. Under the law  
15 enforcement privilege, I'm instructing the witness  
16 not to answer.

17 MR. LEVINE: What's the problem with the  
18 question?

19 MS. REDDY: It would reveal information as  
20 to the types of materials that would be -- they would  
21 look at or not look at, which is privileged  
22 under -- it would put law enforcement methods or

Page 129

1 procedures at risk by revealing that information.

2 MR. LEVINE: How?

3 MS. REDDY: By explaining what files are  
4 looked at and what files are not looked at when  
5 deciding -- when deciding what they're going to look  
6 at.

7 MR. LEVINE: All we're asking about are  
8 files looked at in connection with the name check  
9 done for USCIS.

10 MS. REDDY: Correct.

11 MR. LEVINE: And that's the subject matter  
12 of this lawsuit. It seems to me that it's clear that  
13 it's central to the lawsuit. And unless there's some  
14 way in which this is going to impair the functioning  
15 of the Bureau, the law enforcement privilege doesn't  
16 prevail.

17 MS. REDDY: By revealing which categories  
18 of files they look at or do not look at would impair  
19 the functions of the Bureau.

20 MR. LEVINE: How? I think your burden to  
21 justify the privilege, given the importance of the  
22 issue to the lawsuit, is a strong one, so that you



Page 130

1 have to talk about some specific harm and how that  
2 harm would befall the Bureau, seems to me, doesn't  
3 make sense at all.

4 MR. FELIX: We'll take it under  
5 advisement, but the witness is instructed not to  
6 answer. That's where we stand.

7 MR. LEVINE: If we have to call the  
8 magistrate on it, perhaps we do. But before we get  
9 to that point, are we talking about an abstraction or  
10 something really specific that is, yes, it says  
11 something about how the FBI functions, but that's not  
12 the law enforcement privilege. The law enforcement  
13 privilege requires a showing of some specific harm to  
14 the FBI, and I don't quite understand how you think  
15 that harm would occur.

16 MR. FELIX: If I may?

17 MR. LEVINE: Sure.

18 MR. FELIX: To the extent we reveal the  
19 criteria in the case files that are reviewed in  
20 connection with our name check process, review and  
21 not review, disclosure of that information would  
22 interfere with our process and enable individuals to

Page 131

1 perhaps gain the system and find ways to circumvent  
2 the name check process. That's the basis for the  
3 instruction.

4 MR. LEVINE: Sounds pretty abstract to me.  
5 Well, when we take a break, let's you and I talk  
6 about it, and if we have to, we'll take it up with  
7 the magistrate.

8 MR. CHIN: Okay.

9 BY MR. CHIN:

10 Q Mr. Cannon, by implementing the super  
11 filter and mega filter program, has that helped  
12 reduce the backlog of the USCIS pending name checks?

13 A It has helped reduce the workload  
14 associated with processing name checks.

15 Q And those filters apply to both the new  
16 incoming requests as well as the pending backlog  
17 requests?

18 A That is correct.

19 Q Are there any problems with those -- with  
20 the functioning of those two programs or those two  
21 filters, as far as you know?

22 A No, not as far as I know.

Page 132

1 Q Or in the application and use of those  
2 filters by staff?

3 A No.

4 Q Let me --

5 A Let me rephrase that. There have been  
6 instances where -- actually, let me think this  
7 through, where some of the folks have indicated that  
8 our analysts have indicated, in their mind, that some  
9 of the name checks were filtered out and, in their  
10 mind, shouldn't have been filtered out, based on  
11 their opinion. However, we provided the  
12 information -- that information to CIS, and they have  
13 looked at it to ensure that the information that was  
14 not provided was something that wouldn't have been  
15 crucial to the adjudication of a name check.

16 Q So are you stating that there's some  
17 disagreement among some of your analysts as to what  
18 is or is not considered derogatory information that  
19 the customer, the USCIS should have or not have?

20 A In their opinion, the  
21 information was something CIS should have. CIS has  
22 looked at the information and has said we understand

Page 133

1 this was what was not submitted. And through quality  
2 control checks that we've done, they understand the  
3 type of information is not being provided.

4 Q Just to explain what you mean by "quality  
5 control checks" --

6 A Our folks -- we've looked at it and have  
7 gone back to USCIS and said, essentially, based upon  
8 the filter, this type of information was not provided  
9 to you. And part of a process to, where if we need  
10 to readjust the files that are being eliminated, we  
11 can do that.

12 Q Is it correct to say that the decision to  
13 use the filters was reached by both the FBI and the  
14 CIS in terms of processing USCIS name check requests?

15 A Yes.

16 Q And are they made aware of this somewhat  
17 internal dissension among some of the analysts in  
18 terms of their disagreement about whether certain  
19 files should indeed be looked at and not ignored?

20 MS. REDDY: Objection.

21 BY MR. CHIN:

22 Q Do you understand the question,

<p style="text-align: right;">Page 134</p> <p>1 Mr. Cannon?</p> <p>2 A Yes.</p> <p>3 Q Can you answer?</p> <p>4 A A particular objection from a particular</p> <p>5 analyst would not be individually referred to USCIS.</p> <p>6 What we do is we've taken the information again that</p> <p>7 was not provided to USCIS and -- through the normal</p> <p>8 process, and said these are the type of things that</p> <p>9 you are now receiving from us. And they make a</p> <p>10 determination based on whether or not they need that</p> <p>11 type of information to make adjudication on a</p> <p>12 particular name check.</p> <p>13 Q How is that communicated with your</p> <p>14 counterparts at the CIS? Is that through some sort</p> <p>15 of electronic communication or a letterhead</p> <p>16 memorandum or some other --</p> <p>17 A I provided a memorandum with an attachment</p> <p>18 to USCIS.</p> <p>19 Q Let me ask you, sir, are you familiar with</p> <p>20 the statement that is made by the Office of Inspector</p> <p>21 General that the FBI has reported to them that every</p> <p>22 terrorism record is already digitized? Do you know</p>	<p style="text-align: right;">Page 136</p> <p>1 to where my analysts have the information</p> <p>2 electronically.</p> <p>3 Q Are you saying that the scanned files that</p> <p>4 are now part of your database, are they also</p> <p>5 accessible by other personnel at the FBI who would be</p> <p>6 concerned or interested in counterterrorism or some</p> <p>7 other types of focus?</p> <p>8 A The files are scanned and put in what we</p> <p>9 call the T-drive, and the T-drive is accessible to</p> <p>10 the Name Check Program and folks in the FOIPA</p> <p>11 component of Records Management Division, Freedom of</p> <p>12 Information and Privacy Act. They have access to our</p> <p>13 T-drive. It's kind of the same system that we use</p> <p>14 for the files.</p> <p>15 Q So you're saying that the T-drive, in all</p> <p>16 those scanned documents that you have within your</p> <p>17 department, still fall within the Records Management</p> <p>18 Division in terms of access?</p> <p>19 A Yes.</p> <p>20 Q Does that mean to say that your other</p> <p>21 divisions don't have access to the T-drive?</p> <p>22 A Other divisions within the FBI, to my</p>
<p style="text-align: right;">Page 135</p> <p>1 about that?</p> <p>2 A I'm familiar with that statement.</p> <p>3 Q Yes?</p> <p>4 A Yes.</p> <p>5 Q Is it true?</p> <p>6 A From my vantage point, no.</p> <p>7 Q That's interesting. What do you mean by</p> <p>8 that?</p> <p>9 A We have files that would be terrorist</p> <p>10 files, counterterrorist files, counterintelligence,</p> <p>11 to my knowledge, that may still exist in paper form.</p> <p>12 Q And the paper files, would they be the</p> <p>13 ones that were created before 1995 or --</p> <p>14 A The majority of which would have been</p> <p>15 created before 1995.</p> <p>16 Q But I understand that many of those files</p> <p>17 are becoming scanned and -- is that not true?</p> <p>18 A The files are being scanned as they're</p> <p>19 needed for the National Name Check Program, files are</p> <p>20 being pulled and scanned.</p> <p>21 Q Right.</p> <p>22 A And we're creating an electronic database</p>	<p style="text-align: right;">Page 137</p> <p>1 knowledge, don't have access to the T-drive.</p> <p>2 Q Do not?</p> <p>3 A That is correct.</p> <p>4 Q So when I originally stated the premise</p> <p>5 that the Inspector General reported what the FBI told</p> <p>6 them, that terrorism files were all digitized, do you</p> <p>7 disagree with that assessment?</p> <p>8 A I do not know the basis of that statement</p> <p>9 that was made to the Inspector General. It wasn't</p> <p>10 made by the Records Management Division.</p> <p>11 Q Can you think of a reason why such a</p> <p>12 statement would be made?</p> <p>13 MS. REDDY: Objection.</p> <p>14 BY MR. CHIN:</p> <p>15 Q In terms of the -- is there a plan in the</p> <p>16 National Name Checks Program to indeed digitize all</p> <p>17 of your records?</p> <p>18 A That is the function of the Central</p> <p>19 Records Complex, the CRC, which is mentioned in some</p> <p>20 of the materials that you have --</p> <p>21 Q Yes.</p> <p>22 A -- where eventually all of the nonpending</p>

Page 138

1 files would be pulled to one location within the area  
2 which would be in -- near Winchester, Virginia  
3 where --

4 Q You're talking about the Centralized  
5 Records Complex?

6 A Yes, sir.

7 Q The complex which is supposedly, I guess,  
8 established in 2010 or 2012?

9 A The end of 2010, I believe.

10 Q Maybe later?

11 A Maybe after that is when the first folks  
12 would be slated to move in. There's no need to  
13 digitize all the records at the FBI simply because  
14 there's no need to.

15 Q Why do you say that? Because I thought  
16 the manual search of paper records was a very  
17 important reason for the delays in the name checks  
18 program for many years?

19 A It is. So what we do is under the CRC, we  
20 would identify the types of records that would be  
21 more likely to be requested and useful and have those  
22 scanned. That would be what we consider to be our

Page 139

1 popular file. Then an unpopular file, which would be  
2 records that -- the chances are they wouldn't be  
3 scanned, which would be put on a shelf, and if  
4 needed, would be retrieved. Because some of those  
5 files eventually will age out, they will be archived  
6 in St. Louis.

7 So to spend the millions of dollars that  
8 it would take to do something like that and the  
9 amount of time it would take, which would be beyond,  
10 I think, my lifetime, would be something that's not  
11 feasible.

12 Q Now, I understand that the scanning of  
13 your documents are going into a T-drive, which  
14 apparently is not integrated with the entire FBI  
15 agency itself and other departments?

16 A Right now that's correct.

17 Q Do you have a deadline or a goal as to  
18 when those files will be indeed completely scanned,  
19 the ones that you deem to be relevant and useful?

20 A No, because that would be the purpose of  
21 the Central Records Complex.

22 Q Would that be years in the making?

Page 140

1 A I can't answer that. I don't know.

2 Q But that's slowly going on, the  
3 scanning --

4 A Yes, sir.

5 MR. CHIN: Can I have a moment? We'll go  
6 off the record.

7 (Off the record.)

8 BY MR. CHIN:

9 Q Mr. Cannon, have you or the FBI -- so  
10 going back to my original question. Have you or the  
11 FBI had any discussions with the CIS or Homeland  
12 Security about a risk-based process? And, of course,  
13 you asked me the question what do we mean by  
14 risk-based. But just based on what we understand of  
15 the question -- and I'm not in a position to define  
16 what it means by risk-based, but the concept you're  
17 certainly fully aware of from our previous question  
18 and answers. So have you or have you not or has your  
19 agency talked about this approach?

20 A Yes.

21 Q You have, okay. When did those  
22 discussions take place, as far as you know?

Page 141

1 A Those were last year, in 2007, the results  
2 of which were the super filter and then eventually  
3 the mega filter in the fall of last year.

4 Q Will there be any further changes to your  
5 program on that risk-based approach, or is it the  
6 primary filters that would address that issue?

7 MS. REDDY: Objection.

8 THE WITNESS: I'm not sure I understand  
9 your question.

10 BY MR. CHIN:

11 Q Let me break it down. You just indicated  
12 that the two agencies have discussed the idea of a  
13 risk-based approach or process to reduce the backlog.

14 A Yes, sir.

15 Q Presumably that would also be to address  
16 the incoming requests as well?

17 A Yes, sir.

18 Q New requests, right?

19 A Yes, sir.

20 Q And you answered me and said that we  
21 agreed to implement the super filters and the mega  
22 filters. And I'm asking, are there any other steps,

<p style="text-align: right;">Page 142</p> <p>1 as far as you know, in that understanding that the</p> <p>2 two agencies have now reached?</p> <p>3 A Regarding the filters, we are, again,</p> <p>4 always looking to see if there are categories which</p> <p>5 need to be perhaps maybe added or taken away as far</p> <p>6 as the filtering concept is concerned.</p> <p>7 Q And did USCIS request that conversation or</p> <p>8 how was that initiated, if you know?</p> <p>9 MS. REDDY: Objection, that goes to the</p> <p>10 deliberative process privilege. That answer would be</p> <p>11 protected.</p> <p>12 MR. CHIN: I'm simply asking which agency</p> <p>13 invited the other to discuss this risk-based</p> <p>14 approach.</p> <p>15 MS. REDDY: Okay.</p> <p>16 You can answer.</p> <p>17 BY MR. CHIN:</p> <p>18 Q If you understand the question.</p> <p>19 A We work so closely with USCIS, I'm</p> <p>20 reserved to say it was completely our idea or their</p> <p>21 idea. We always are looking together as partners on</p> <p>22 ways in which to streamline the process.</p>	<p style="text-align: right;">Page 144</p> <p>1 Understanding, which implemented the mega filter.</p> <p>2 Q And that was also in late 2007, right?</p> <p>3 A Yes, sir, that is correct.</p> <p>4 Q I imagine there are a number of meetings</p> <p>5 leading up to that Memorandum of Understanding,</p> <p>6 correct?</p> <p>7 A There were some meetings that took place.</p> <p>8 Q Would that have been with Mr. Smith, for</p> <p>9 example, at the USCIS?</p> <p>10 A No. The mega filter meetings initially</p> <p>11 took place at a very high level, Deputy Director</p> <p>12 Jackson of DHS. I believe Jock Scharfen, who's now</p> <p>13 the acting director of the USCIS, the FBI's Deputy</p> <p>14 Director, John Pistole, and my boss, Assistant</p> <p>15 Director Bill Hooton was also at the meeting.</p> <p>16 Q So that resulted in the Memo of</p> <p>17 Understanding that you --</p> <p>18 A That started the ball rolling on the</p> <p>19 Memorandum of Understanding, yes, sir.</p> <p>20 Q Would that also have included a discussion</p> <p>21 or a decision made about how those moves would be</p> <p>22 financed by which agency, if you know?</p>
<p style="text-align: right;">Page 143</p> <p>1 Q Was that risk-based approach discussion</p> <p>2 commenced in late 2007?</p> <p>3 A It would have been -- it was the</p> <p>4 premise -- initial premise to the super filter, so</p> <p>5 that would have been earlier in 2007. Early 2007.</p> <p>6 Q Did that discussion require that you</p> <p>7 obtain the go-ahead from any higher authorities at</p> <p>8 the FBI? In other words, did you have to get</p> <p>9 approval from a superior on this new risk-based</p> <p>10 approach or, in this example that you gave, the</p> <p>11 implementation of filters?</p> <p>12 A With the super filter, my boss, Bill</p> <p>13 Hooton, Assistant Director of Records Management,</p> <p>14 would have gone to his boss, the Associate Deputy</p> <p>15 Director of the Bureau, and what we were doing and</p> <p>16 how we were proceeding. The mega filter was decided</p> <p>17 at a very high level --</p> <p>18 Q And how high a level would that be?</p> <p>19 A It would be the folks that were the</p> <p>20 signatories to the MOU.</p> <p>21 Q The Memorandum of Understanding?</p> <p>22 A Yeah, I'm sorry. Yes, Memorandum of</p>	<p style="text-align: right;">Page 145</p> <p>1 A I'm trying to understand the genesis of</p> <p>2 the question as far as financing the filter.</p> <p>3 Q I guess these filters and the -- well, you</p> <p>4 tell me. Were they free or did they involve a cost?</p> <p>5 A They were developed -- the actual filter</p> <p>6 process was developed by our Information Technology</p> <p>7 Operations Division, ITOD, as far as we would present</p> <p>8 them with the parameters and they would write the</p> <p>9 code to adjust the search in the Name Check Program.</p> <p>10 Q Let me ask you, sir, are you aware</p> <p>11 of -- are you aware of a study being conducted or an</p> <p>12 assessment being conducted within your agency --</p> <p>13 A When you say "agency," you mean the FBI or</p> <p>14 Records Management Division?</p> <p>15 Q I mean FBI.</p> <p>16 A Okay.</p> <p>17 Q It would include your division as well, of</p> <p>18 course. The question is whether or not you are aware</p> <p>19 of some process by which the -- there's an</p> <p>20 examination of the impact or the possible effects of</p> <p>21 eliminating the FBI reference checks in the course of</p> <p>22 doing your name checks for the USCIS. Are you</p>

Page 146

1 familiar with that? Do you understand my question?  
 2 MS. REDDY: Objection.  
 3 MR. CHIN: Meaning?  
 4 MS. REDDY: For form.  
 5 BY MR. CHIN:  
 6 Q Let me restate that -- do you understand  
 7 my question? I can rephrase it.  
 8 A I want to say I think I do, but please  
 9 rephrase it so I make sure I understand it.  
 10 MS. REDDY: And if you can, please clarify  
 11 the time frame as well.  
 12 MR. CHIN: Well, there is no specific time  
 13 frame, but I am asking whether he has any knowledge  
 14 or awareness of some discussion or some evaluation  
 15 going on, let's say, in the last year or currently,  
 16 into the possibility of eliminating the entire  
 17 reference checks process affiliated to the name  
 18 checks process --  
 19 THE WITNESS: I'm not aware of any  
 20 discussions within the FBI or studies that would go  
 21 to that.  
 22 BY MR. CHIN:

Page 147

1 Q I apologize, I must have misplaced the  
 2 document, but this is referenced in a memo from FBI,  
 3 Mr. Hooton to Mr. Jonathan Scharfen at the USCIS, and  
 4 it's January of '08, which is quite recent. I  
 5 understood from that memo that there was some sort of  
 6 technological or other evaluation that was taking  
 7 place on that very issue. So if you don't understand  
 8 it or know it, that's fine. But as the  
 9 representative of the agency, I wonder whether that's  
 10 something you can find out for us.  
 11 MS. REDDY: He just answered the question,  
 12 Counsel.  
 13 MR. CHIN: As to his personal knowledge,  
 14 but as a 30(b)(6) representative.  
 15 MS. REDDY: And the document that you're  
 16 referring to?  
 17 MR. CHIN: Would you like me to give you  
 18 the Bates-stamped number?  
 19 MS. REDDY: But you can't show it to the  
 20 witness? You're asking him --  
 21 MR. CHIN: I'm asking him about whether  
 22 he's aware of the basic --

Page 148

1 MS. REDDY: So we're not talking about the  
 2 document that you're --  
 3 MR. CHIN: No, but that's where it seems  
 4 to come out of.  
 5 MR. LEVINE: He was asked if he knows  
 6 about a memo from Hooton to Scharfen.  
 7 THE WITNESS: I was not asked that  
 8 question, sir.  
 9 MR. LEVINE: Pardon?  
 10 THE WITNESS: I was not asked such a  
 11 question.  
 12 MR. LEVINE: Do you?  
 13 BY MR. CHIN:  
 14 Q I'll ask you that question. Do you know  
 15 about such a memo from Mr. Hooton to Mr. Scharfen  
 16 about this very proposal for this evaluation?  
 17 A There are memorandums from Mr. Hooton and  
 18 Mr. Scharfen that cover what we've done on the Name  
 19 Check Program or proposing to do some of the things  
 20 that we're looking at. I don't recall an analysis  
 21 that we have done, the analysis the Bureau has done  
 22 which would result in the elimination of all USCIS

Page 149

1 references. In other words, going back to checking  
 2 just main files only, that would be something that  
 3 the customer would have to agree to.  
 4 Q And I'm sorry, I don't have the document,  
 5 but my understanding is that it would be -- the  
 6 evaluation of -- I'm not saying it's an evaluation  
 7 that's completed, it's not. I don't know that. But  
 8 it would involve eliminating the reference checks  
 9 with the exception of national security checks,  
 10 whatever that means. Do you know about such a report  
 11 or activity that is being conducted within your  
 12 division or at the FBI?  
 13 A There may be a law-enforcement sensitive  
 14 issue involved with that. I'd like to take time and  
 15 talk to counsel about it.  
 16 MR. LEVINE: We have the document. We  
 17 don't have it here, we have it in New York. Maybe we  
 18 can get it faxed, unless you have it with you and I  
 19 can give you a number for it. Do you want to see if  
 20 you have it?  
 21 MS. REDDY: Sure.  
 22 MR. LEVINE: It's FBI1108 to -- 1105 to



<p style="text-align: right;">Page 150</p> <p>1 1108.</p> <p>2 MR. CHIN: And it specifically references</p> <p>3 that page 1107.</p> <p>4 MS. REDDY: Can we take a break?</p> <p>5 MR. CHIN: Sure.</p> <p>6 (Off the record.)</p> <p>7 MR. CHIN: We've just agreed that we will</p> <p>8 be obtaining that FBI memo in a few moments, and then</p> <p>9 we can resume questioning on that subject matter.</p> <p>10 I'm going to move forward and ask some additional</p> <p>11 questions.</p> <p>12 BY MR. CHIN:</p> <p>13 Q Concerning the 2008 policy that was</p> <p>14 implemented and announced by the USCIS with respect</p> <p>15 to processing adjustment of status applications for</p> <p>16 lawful permanent residency, do you know about that</p> <p>17 policy?</p> <p>18 A I am familiar with the policy, yes, sir.</p> <p>19 Q What is your understanding of that policy?</p> <p>20 A My understanding of that policy is that</p> <p>21 they will not wait for the results of an FBI name</p> <p>22 check. After a certain period of time, they will go</p>	<p style="text-align: right;">Page 152</p> <p>1 status --</p> <p>2 Q Yes, it is. The same, exactly. Would</p> <p>3 that process continue -- regardless of the decision</p> <p>4 by CIS to approve, would those name checks continue</p> <p>5 through the course of a reference check, if</p> <p>6 necessary?</p> <p>7 A Yes, sir.</p> <p>8 Q And those could indeed take a lot of time</p> <p>9 from your analyst staff or from your dissemination</p> <p>10 staff or other staff; is that correct?</p> <p>11 A It would depend upon the number of name</p> <p>12 checks that came in, the number of hits that were on</p> <p>13 a particular name check. There's no way to figure</p> <p>14 out if it would take a lot of time.</p> <p>15 Q Let me ask you about the 2002 policy and</p> <p>16 decision by the FBI to expand the name check process</p> <p>17 to include reference files. Plaintiff's Exhibit 9, I</p> <p>18 understand you've looked at it?</p> <p>19 A Yes, sir.</p> <p>20 Q Do you know how that policy came into</p> <p>21 being, the decision to expand name checks beyond the</p> <p>22 main files?</p>
<p style="text-align: right;">Page 151</p> <p>1 ahead and process the application and, if needed,</p> <p>2 adjust after the receipt of the FBI name check.</p> <p>3 Q That's correct. Did that policy arise in</p> <p>4 consultation with the FBI?</p> <p>5 A No.</p> <p>6 Q Does that policy in any way affect the</p> <p>7 running of the National Name Check Program with</p> <p>8 respect to USCIS name check requests?</p> <p>9 A No.</p> <p>10 Q Would it affect the prioritizing of any of</p> <p>11 those name check requests?</p> <p>12 A No. The only way a name check priority is</p> <p>13 decided is at the specific request of a customer, in</p> <p>14 this case, USCIS, if they wanted to expedite a</p> <p>15 particular name check. Also, unless it was agreed</p> <p>16 upon, such as you saw in the business plan, the</p> <p>17 29,000 naturalization cases, those types were agreed</p> <p>18 to at that point in time. In all cases,</p> <p>19 prioritization is at the request of the customer.</p> <p>20 Q The name checks submitted on behalf of</p> <p>21 applicants for lawful permanent residency --</p> <p>22 A Would this be the same thing as adjustment</p>	<p style="text-align: right;">Page 153</p> <p>1 A The policy was a result of the facts laid</p> <p>2 out in this EC dated December 13th, 2002.</p> <p>3 Q And that is that the agency decided we now</p> <p>4 must require all name check requests to go through,</p> <p>5 not just the main files, but also --</p> <p>6 A The reference files.</p> <p>7 Q -- reference file checks as well?</p> <p>8 A Checking for mains and references, that is</p> <p>9 correct, sir.</p> <p>10 Q And what was the goal in expanding those</p> <p>11 name checks to include reference files?</p> <p>12 A To ensure that some pertinent information</p> <p>13 that would be needed by USCIS in adjudicating the</p> <p>14 applications -- at that point in time, it was the</p> <p>15 INS, Immigration and Naturalization Service. To</p> <p>16 ensure that -- considering this was a post-9/11</p> <p>17 environment, ensuring that some crucial information</p> <p>18 would not be overlooked.</p> <p>19 Q When you refer to the 9/11 environment,</p> <p>20 are you thinking that there was a lot of</p> <p>21 finger-pointing going on at the time?</p> <p>22 MS. REDDY: Objection.</p>

Page 154

1 BY MR. CHIN:  
 2 Q What do you mean by the "post-9/11  
 3 environment" you just answered? How would you  
 4 explain that phrase that you just used?  
 5 A Give me a moment, please.  
 6 Q Sure, sure.  
 7 A Okay. On page 2, it says in the EC, under  
 8 FBI and SMOU, so this is a Risk Management issue, the  
 9 last sentence -- second to last sentence, "The  
 10 factors of which, of course, change after September  
 11 11th."  
 12 Q Do you know who at the FBI would have  
 13 approved this decision?  
 14 A The decision to go ahead and redo -- go  
 15 ahead and check main files and reference files?  
 16 Q Yes, that's correct. If you know.  
 17 A According to the EC, the FBI went ahead  
 18 and did that on its own.  
 19 Q As the 30(b)(6) designee, do you know  
 20 whether an assessment was made contemporaneously with  
 21 that decision to expand the name check process to  
 22 include reference files?

Page 155

1 MS. REDDY: Objection. The assessment as  
 2 to?  
 3 MR. CHIN: The assessment as to whether it  
 4 could be done and whether it required more resources.  
 5 BY MR. CHIN:  
 6 Q For example, whether it would be  
 7 implementable or something that could be done with  
 8 the given resources of the department of the National  
 9 Name Check Program at the time.  
 10 A Give me a moment. I heard your question.  
 11 Q Sure.  
 12 A On page 2 of the EC, under missed name  
 13 check certification, the second paragraph. The last  
 14 sentence, "Not waiting for INS response, NNCP  
 15 immediately modified the search criteria to cover  
 16 around-the-clock phonetic searches and main cross  
 17 reference hits."  
 18 Q Yes, I see that. Wasn't it your  
 19 testimony, Mr. Cannon, that the customer is right and  
 20 that the customer would be the determinant in  
 21 deciding what types of checks they would want from  
 22 your program?

Page 156

1 A Yes, sir, that is correct. Generally  
 2 speaking, that is the case which is, I think, evident  
 3 of the MUO, which is on page 2 at the top. "Pursuant  
 4 to an MOU executed on January 15th, defined the  
 5 searching requirements agreed to between the  
 6 agencies." At that point in time, the customer,  
 7 USCIS, indicated they were willing to do the main  
 8 file checks.  
 9 Q But I understand from this memo -- and  
 10 correct me if I'm not characterizing it properly, but  
 11 from what I understand of the memo, the FBI had  
 12 already initiated that change in December prior to  
 13 the MOU being signed in mid January --  
 14 A I'm sorry, the January MOU -- the January  
 15 15th, 1985 MOU --  
 16 Q I'm sorry, that's right.  
 17 A -- had established that they were only  
 18 going to do main files.  
 19 Q Right.  
 20 A And then it looks at if, in this case at  
 21 this point in time, the FBI modified the search  
 22 criteria to cover around-the-clock phonetic searches

Page 157

1 and main and cross reference hits.  
 2 Q Without waiting for the USCIS or INS?  
 3 A According to this ECS, that is correct.  
 4 Q You can also -- if I may ask you to look  
 5 over at page 4. It talks about the 2.2 million names  
 6 that are being reprocessed. We understand that to be  
 7 called the resubmission or rerun?  
 8 A Yes, sir.  
 9 Q And I've seen figures where it's 2.7  
 10 million as well?  
 11 A Yes, sir.  
 12 Q So is it more correct to say it was a  
 13 2.7 million --  
 14 A My understanding was it was eventually  
 15 2.7 million.  
 16 Q Right. Under the heading Recommend Fee  
 17 Sharing, I will read to you, "The NNCP has already  
 18 received the tapes with the 2.2 million names and has  
 19 begun the process of rechecking these names,  
 20 processing the tapes will delay more recent INS  
 21 submissions, but they have accepted this likelihood."  
 22 So at the point of agreeing to reprocess

<p style="text-align: right;">Page 158</p> <p>1 2.2 million and then soon to be 2.5 million --</p> <p>2 A 2.7 million is the figure that we used,</p> <p>3 sir.</p> <p>4 Q Right. There was no increase in staff</p> <p>5 resources; is that correct?</p> <p>6 A Yes, sir. To my knowledge, that is</p> <p>7 correct.</p> <p>8 Q As a result of that, would it be correct</p> <p>9 to say that that made a substantial or a very</p> <p>10 important contribution to the delays of name check</p> <p>11 processing from that point on?</p> <p>12 MS. REDDY: Objection.</p> <p>13 MR. CHIN: Because?</p> <p>14 MS. REDDY: The term "substantial" --</p> <p>15 MR. CHIN: All right.</p> <p>16 MS. REDDY: And also --</p> <p>17 MR. CHIN: Let's ask Mr. Cannon -- I'll</p> <p>18 withdraw substantial --</p> <p>19 MS. REDDY: -- and as to time frame as</p> <p>20 well.</p> <p>21 BY MR. CHIN:</p> <p>22 Q Let me ask, Mr. Cannon, do you understand</p>	<p style="text-align: right;">Page 160</p> <p>1 I do not know specifically how he addressed the</p> <p>2 specific question.</p> <p>3 Q Sure. Have you, in conversation as</p> <p>4 professional, asked him in general about that</p> <p>5 important event?</p> <p>6 A I've discussed this event numerous times</p> <p>7 with Mr. Hardy regarding the resubmission of the name</p> <p>8 checks. And the resubmission of the name checks</p> <p>9 undoubtedly created an immediate backlog of over</p> <p>10 440,000 name checks, which I believe is also in my</p> <p>11 declaration.</p> <p>12 Q USCIS --</p> <p>13 A Yes, sir, the resubmission of the USCIS</p> <p>14 name checks of 2.7 million, which created the initial</p> <p>15 backlog.</p> <p>16 Q But in the course of your discussing the</p> <p>17 program that you supervise now and in preparation for</p> <p>18 the deposition that you are here before, did you ever</p> <p>19 confirm with him that indeed that rerun submission</p> <p>20 was a very important and had caused -- contributed</p> <p>21 adversely to the processing of name checks?</p> <p>22 A We've had conversations in the past, yes,</p>
<p style="text-align: right;">Page 159</p> <p>1 the gist of my question? I don't think it's too</p> <p>2 complicated.</p> <p>3 Didn't that make a big impact, that</p> <p>4 2.5 million, right, that came in through the process,</p> <p>5 didn't that really create a mountain of work for the</p> <p>6 staff?</p> <p>7 A Yes. The 2.7 million resubmission was</p> <p>8 what we considered to be the genesis of the beginning</p> <p>9 of the backlog of USCIS pending name checks.</p> <p>10 Q Now, I'm not sure you're familiar with</p> <p>11 what Mr. Hardy has said in testimony, but he takes</p> <p>12 the position that it didn't really make a big</p> <p>13 difference.</p> <p>14 MS. REDDY: Objection.</p> <p>15 Context? What testimony are you --</p> <p>16 MR. CHIN: Sorry, I withdraw that.</p> <p>17 BY MR. CHIN:</p> <p>18 Q Are you familiar with Mr. Hardy's position</p> <p>19 on that submission of the 2.7 million and whether</p> <p>20 that had any adverse impact on the processing time</p> <p>21 and the -- processing time of name checks?</p> <p>22 A I have not read Mr. Hardy's testimony, so</p>	<p style="text-align: right;">Page 161</p> <p>1 sir, discussing the result or the impact that the</p> <p>2 rerun had on the National Name Check Program.</p> <p>3 Q In a very simple fashion, can you tell me</p> <p>4 what his thoughts were or his position was when he</p> <p>5 conferred with you about the resubmission of 2.7</p> <p>6 million files?</p> <p>7 A My understanding of the conversation with</p> <p>8 Mr. Hardy is that the backlog was -- the backlog we</p> <p>9 dealt with for -- the backlog that was in existence</p> <p>10 when I came to the FBI in March of 2005 of USCIS name</p> <p>11 checks was created by the resubmission of the</p> <p>12 2.7 million name checks.</p> <p>13 Q When you came into the picture, as I</p> <p>14 understand, the unit was spun off into its own</p> <p>15 section, and you became the section chief in 2005 --</p> <p>16 A Mr. Hardy was the section chief of both</p> <p>17 sections --</p> <p>18 Q Yes, acting.</p> <p>19 A And when I came in, I became the section</p> <p>20 chief of the National Name Check Program, yes, sir.</p> <p>21 Q Did you understand that you did not have</p> <p>22 the staff and resources to address that inheritance</p>

<p style="text-align: right;">Page 162</p> <p>1 of whatever several -- 2.7 million or whatever and  2 the other name check requests that continued to come  3 into your program?  4 A When I initially walked in the door and  5 took the job, no, I did not --  6 Q But at some point thereafter, you  7 recognize that there was a serious crisis; isn't that  8 correct?  9 MS. REDDY: Objection.  10 BY MR. CHIN:  11 Q Do you understand my question?  12 A I understand your question.  13 Q Can you answer that?  14 A When I came in and took over the program,  15 through examination of the program and discussions  16 with Mr. Hardy, I did recognize that there was a  17 large number of USCIS name checks that were pending  18 and that we needed to come to some strategies to  19 address these name checks.  20 Q Well, it's my understanding that, of  21 course, the backlog wasn't just limited to the CIS  22 request, that it also impacted your other customers</p>	<p style="text-align: right;">Page 164</p> <p>1 well, and that the customer request that come after  2 December 20th follow behind that queue?  3 A No.  4 Q No?  5 A The names were submitted over a five-week  6 period from December 2002 to January of 2003.  7 Q Okay.  8 A Another customer, say my larger customer,  9 USCIS and OPM, have folks specifically assigned to  10 work those name checks. So if I was working on an  11 OPM name check per se or that was my desk -- because  12 USCIS got some -- a rerun that came in, say, on a  13 given date, it wouldn't affect -- if I continued to  14 work on the OPM desk, it would not affect how I chose  15 to work on the OPM desk. In other words, a name  16 check submitted by OPM or any other customer falls on  17 another desk affected the folks that were working on  18 the -- at that point in time, the INS desk, which  19 subsequently was the USCIS desk, and any folks that  20 may have been taken off of any other desks to help  21 handle it.  22 Q Just to clarify for my information, in the</p>
<p style="text-align: right;">Page 163</p> <p>1 as well; isn't that true?  2 A The backlog would -- a backlog would  3 effect the customer, USCIS, and if they took folks  4 off of one customer to work on another customer's  5 backlog, it would certainly affect the other  6 customer, too.  7 Q And at that time, was there also a  8 principle of first in and first served in terms of  9 customer requests from all the various customers?  10 A With the exception of if a customer  11 requested an expedite, then that was the approach  12 that we were supposed to be taking, that is correct.  13 Q Does that mean that the USCIS -- and this  14 is just -- not specific dates, but on -- I think it  15 was in December, I believe, that they submitted these  16 tapes with all the 2.2 million and then subsequent  17 other tapes to the name checks program. So they  18 submitted these tapes with, let's say, the  19 2.2 million people on December 20th. Would those  20 people on December 20th be treated as if they were in  21 the same line with all other customers submitting  22 their requests for name checks on December 20th as</p>	<p style="text-align: right;">Page 165</p> <p>1 year 2002 or early 2003, are you aware or are you  2 saying that OPM had a special desk or it had sent  3 their own staff there to help with processing their  4 name check requests?  5 A No, sir. I'm saying we had folks at the  6 FBI that were specifically assigned to work OPM name  7 checks.  8 MS. REDDY: Do you mind if we take a quick  9 break?  10 MR. CHIN: Sure.  11 (Brief recess.)  12 MR. CHIN: Can you read back the last  13 question and answer?  14 (The reporter read the requested portion  15 of the record.)  16 BY MR. CHIN:  17 Q So therefore, there was also another desk  18 that handled the USCIS name check requests; is that  19 how I understand the structure at the time?  20 A Yes.  21 Q Would you happen to know whether the  22 staffing levels for the USCIS desk, how they</p>

<p style="text-align: right;">Page 166</p> <p>1 increased over time from when you got there, if you</p> <p>2 know?</p> <p>3 A They have increased over time since I got</p> <p>4 there to the present, present day. I can't</p> <p>5 specifically tell you on what month of what year the</p> <p>6 certain levels were.</p> <p>7 Q That's fine. Would it be fair to say that</p> <p>8 those levels went up and down in terms of staffing</p> <p>9 levels?</p> <p>10 A I think that would probably be correct,</p> <p>11 because we had quite a few folks that had left the</p> <p>12 Bureau --</p> <p>13 Q And do you recall whether the leaving of</p> <p>14 those particular staff added to the delays in</p> <p>15 processing the USCIS name check requests?</p> <p>16 A I don't recall.</p> <p>17 Q Would it have contributed to delays in</p> <p>18 processing?</p> <p>19 A It could have, yes.</p> <p>20 Q And do you remember what year that staff</p> <p>21 reduction took place?</p> <p>22 A Over a period of years.</p>	<p style="text-align: right;">Page 168</p> <p>1 section?</p> <p>2 A That is correct.</p> <p>3 Q And in your section, do you also have</p> <p>4 staff that are handling name check requests,</p> <p>5 presumably some of those name check requests, are</p> <p>6 they being expedited because of litigation, do you</p> <p>7 know?</p> <p>8 A Our policy -- the Bureau's policy is not</p> <p>9 to expedite based on litigation. An expedite is done</p> <p>10 at the request of the customer, USCIS. On what basis</p> <p>11 they decide to expedite a particular name check is</p> <p>12 their call.</p> <p>13 Q Well, have you had any discussions with</p> <p>14 any of your counterparts at the USCIS where you were</p> <p>15 told or informed we really need to move out some of</p> <p>16 these name checks, particular name check cases, we</p> <p>17 need to do so because we're under the gun, under</p> <p>18 pressure because of a lawsuit or a motion</p> <p>19 for -- thank you very much.</p> <p>20 A I believe I've had some conversations</p> <p>21 with -- well, I have had some conversations with CIS</p> <p>22 regarding just the level of work that they are going</p>
<p style="text-align: right;">Page 167</p> <p>1 Q Beginning from when to when?</p> <p>2 A When I came on board in 2005 to 2007.</p> <p>3 Q I'm going to ask you about -- in terms of</p> <p>4 the FBI's resources, is it your understanding that</p> <p>5 your staff and the FBI's staff and resources have</p> <p>6 been involved with handling -- with litigation and</p> <p>7 individual FOIA requests all related to the</p> <p>8 processing delays and name requests?</p> <p>9 MS. REDDY: Objection, form.</p> <p>10 BY MR. CHIN:</p> <p>11 Q Do you understand -- is it true that your</p> <p>12 staff resources within the Name Check Program or</p> <p>13 within the Records Management Division, for example,</p> <p>14 are very involved with, I guess, addressing FOIA</p> <p>15 requests that come in the door related to processing</p> <p>16 delays and name checks; do you know that?</p> <p>17 A The FOIPA section --</p> <p>18 Q Can you tell me --</p> <p>19 A Freedom of Information and Privacy Act</p> <p>20 section handles the Freedom of Information Act</p> <p>21 requests that come in the door.</p> <p>22 Q And that's within Mr. Hardy's current</p>	<p style="text-align: right;">Page 169</p> <p>1 through due to the litigation. I don't recall</p> <p>2 specifically -- I do not recall specific</p> <p>3 conversations regarding a particular name check due</p> <p>4 to litigation.</p> <p>5 Q Well, the general conversation that you</p> <p>6 just referred to, when did that take place?</p> <p>7 A With Greg Smith over a period of the past</p> <p>8 year or so.</p> <p>9 Q In 2007?</p> <p>10 A 2007, 2008.</p> <p>11 Q But before that, there was no such similar</p> <p>12 conversation about -- from any of the other CIS</p> <p>13 officials?</p> <p>14 A Regarding litigation?</p> <p>15 Q Well, regarding the need to get name check</p> <p>16 processing really done quicker or in some way address</p> <p>17 the delays as a result of litigation. Has</p> <p>18 anyone -- I'm sorry.</p> <p>19 A As I recall, litigation was or used to be</p> <p>20 one of the factors they considered in expediting, but</p> <p>21 that was something they decided, not the Bureau.</p> <p>22 Q At the FBI, we have sued your agency and</p>



<p style="text-align: right;">Page 170</p> <p>1 so, presumably, there are resources being expended by</p> <p>2 your agency in defending litigation related to</p> <p>3 naturalization delays; is that correct?</p> <p>4 A Yes, that is correct.</p> <p>5 Q So would it be fair to say that the Office</p> <p>6 of General Counsel might speak to your boss or speak</p> <p>7 to you, we have this particular litigation, what can</p> <p>8 you find out for us about these specific individuals?</p> <p>9 Does that occur?</p> <p>10 MS. REDDY: Objection. I think that might</p> <p>11 be protected under the attorney-client privilege what</p> <p>12 his counsel is going to him about pending litigation.</p> <p>13 MR. CHIN: Not the specifics of the</p> <p>14 conversation.</p> <p>15 BY MR. CHIN:</p> <p>16 Q The fact that -- maybe not the Office of</p> <p>17 General Counsel, but some other unit or division at</p> <p>18 the FBI communicating to you that there is this need</p> <p>19 to deal with a litigation related to name checks.</p> <p>20 Has that happened, those kinds of conversations?</p> <p>21 A The only conversations I've had regarding</p> <p>22 name check litigation specifically is with the Office</p>	<p style="text-align: right;">Page 172</p> <p>1 A That was referred to the Office of General</p> <p>2 Counsel within the Bureau to provide that</p> <p>3 information.</p> <p>4 Q I see. Wouldn't that office have asked</p> <p>5 you, well, tell me, can you give me an estimate or a</p> <p>6 number of how many of the staff that you have in your</p> <p>7 program, how many of them are involved with this</p> <p>8 particular task or -- would that ever have occurred</p> <p>9 where the data that was needed for a response to the</p> <p>10 congressional request, would that have involved you</p> <p>11 at all?</p> <p>12 A Some of the QFRs dealt with the specifics</p> <p>13 of the Name Check Program itself. The questions</p> <p>14 pertaining to litigation were referred to the Office</p> <p>15 of General Counsel.</p> <p>16 Q Now, your plaintiffs in this litigation,</p> <p>17 we have five out of six of our named plaintiffs now</p> <p>18 who have been adjudicated by the USCIS. Did you</p> <p>19 review or did any of your staff review any of the</p> <p>20 A-files of the named plaintiffs in this action?</p> <p>21 MS. REDDY: Sorry, do we -- we might need</p> <p>22 to define A-files for Mr. Cannon.</p>
<p style="text-align: right;">Page 171</p> <p>1 of General Counsel representatives, outside of the</p> <p>2 name check section.</p> <p>3 Q Right. Let me ask you then, with</p> <p>4 specific -- I think that there was a report, and I</p> <p>5 can't at this very moment identify it, but I believe</p> <p>6 there has been some assessment or some kind of</p> <p>7 report -- I'm just asking if you know of its</p> <p>8 existence, but this report would contain information</p> <p>9 about the man-hours of staffing from the FBI that is</p> <p>10 being deployed in addressing litigation regarding</p> <p>11 naturalization lawsuits. Do you know of such a</p> <p>12 report or such information?</p> <p>13 A Yes.</p> <p>14 Q Where would that be found?</p> <p>15 A As I recall, that was a question that was</p> <p>16 raised in what we call a question for the record, a</p> <p>17 QFR, from a congressional person or committee.</p> <p>18 Q And do you recall when that QFR was sent</p> <p>19 to you requesting information?</p> <p>20 A I did not provide the information</p> <p>21 regarding the man-hours in support of litigation.</p> <p>22 Q Okay. But someone did from your agency?</p>	<p style="text-align: right;">Page 173</p> <p>1 BY MR. CHIN:</p> <p>2 Q Do you understand the term A-files?</p> <p>3 MS. REDDY: I'm not sure --</p> <p>4 BY MR. CHIN:</p> <p>5 Q Have you heard the term A-files?</p> <p>6 A Yes.</p> <p>7 Q What do you understand that to mean?</p> <p>8 A It's an alien registration number given to</p> <p>9 someone applying for benefits that is assigned by the</p> <p>10 USCIS.</p> <p>11 Q Right. And I understand the A-files are</p> <p>12 the entire record that is kept on that particular</p> <p>13 individual and not just the number itself, but the</p> <p>14 file of all the records that relate to that</p> <p>15 individual.</p> <p>16 A That would be a record kept by USCIS?</p> <p>17 Q Yes, ordinarily. And then the question I</p> <p>18 have is, have those files ever been shared with your</p> <p>19 office?</p> <p>20 A Not to my knowledge, no.</p> <p>21 Q Did you or anyone in your section review</p> <p>22 the name check files of our plaintiffs in the last</p>

<p style="text-align: right;">Page 174</p> <p>1 year?</p> <p>2 A If the name check request for your</p> <p>3 plaintiffs resulted in hits on FBI files that</p> <p>4 required someone to look at and analyze, the answer</p> <p>5 would be yes.</p> <p>6 Q But you do not know specifically</p> <p>7 whether -- let me withdraw that.</p> <p>8 Let me ask you, do you know if any of the</p> <p>9 name checks or background checks for the named</p> <p>10 plaintiffs were handled on an expedited basis?</p> <p>11 A I don't recall the specific plaintiffs in</p> <p>12 your case. I do not recall, no.</p> <p>13 Q If an expedited request was made by USCIS</p> <p>14 regarding our named plaintiffs, who would that</p> <p>15 request go to on your staff or to you?</p> <p>16 A The request goes to my staff.</p> <p>17 Q Anyone in particular?</p> <p>18 A Debbie Pecynski.</p> <p>19 Q What is Ms. Pecynski's title or what</p> <p>20 exactly does she do?</p> <p>21 A She's a team lead on the USCIS desk. She</p> <p>22 is currently responsible for organizing the expedites</p>	<p style="text-align: right;">Page 176</p> <p>1 would have required your attention?</p> <p>2 A From time to time, Ms. Pecynski may raise</p> <p>3 an issue regarding an issue associated with an</p> <p>4 expedited request to me, yes.</p> <p>5 Q What circumstance would that be where she</p> <p>6 would call upon you?</p> <p>7 A Occasionally, it may be -- we limit USCIS</p> <p>8 to a hundred expedites a week and say, hey, they're</p> <p>9 going over their limit, they submitted, 115, 120,</p> <p>10 things of that nature.</p> <p>11 Q Would you be asked to waive that limit for</p> <p>12 the USCIS?</p> <p>13 A No. I would say that 15 applies to the</p> <p>14 next 100.</p> <p>15 Q And is it true that the policy is 100</p> <p>16 requests for expedites per week?</p> <p>17 A Yes, sir.</p> <p>18 Q And has USCIS made efforts to ask for</p> <p>19 expedites beyond that limit on a regular basis?</p> <p>20 A To my knowledge, no, not on a regular</p> <p>21 basis.</p> <p>22 Q I think I'm winding down. I'm still</p>
<p style="text-align: right;">Page 175</p> <p>1 for USCIS.</p> <p>2 Q Has Ms. Pecynski been involved as the team</p> <p>3 lead for the CIS desk for some time now?</p> <p>4 A She's handled the USCIS expedites for some</p> <p>5 time, that's correct.</p> <p>6 Q Do you have a sense of how long she's been</p> <p>7 on that --</p> <p>8 A Over a year.</p> <p>9 Q So in other words, she may know, you don't</p> <p>10 know; is that correct?</p> <p>11 MS. REDDY: I'm sorry, can we clarify the</p> <p>12 question?</p> <p>13 MR. CHIN: Yes. I'm sorry, I was talking</p> <p>14 about whether expedites were requested for the name</p> <p>15 checks for our named plaintiffs, and I believe</p> <p>16 Mr. Cannon's saying he didn't know, but handling the</p> <p>17 expedites was being done by Ms. Pecynski.</p> <p>18 BY MR. CHIN:</p> <p>19 Q Is that correct?</p> <p>20 A That's correct.</p> <p>21 Q Has Ms. Pecynski come to you about any</p> <p>22 particular specific requests from the USCIS that</p>	<p style="text-align: right;">Page 177</p> <p>1 waiting for something.</p> <p>2 Something that we talked about earlier</p> <p>3 today, and that was the question of getting more</p> <p>4 resources and being able to reduce the backload of</p> <p>5 the CIS pending cases. You said that space was a</p> <p>6 limitation, correct?</p> <p>7 A Logistics was a limitation to -- it was</p> <p>8 one of -- one of a couple limitations, as far as</p> <p>9 bringing more folks on board.</p> <p>10 Q Let me ask you, though, whether or not if</p> <p>11 the funding that you have received through the CIS</p> <p>12 and through your fee schedule for customer fees,</p> <p>13 whether that would afford the agency the ability to</p> <p>14 lease more space if needed?</p> <p>15 MS. REDDY: Objection. Again, it's a</p> <p>16 hypothetical. He's here as a fact witness. He's</p> <p>17 not -- he said there's a different division that</p> <p>18 obtains the location --</p> <p>19 MR. LEVINE: You have an objection as to</p> <p>20 form.</p> <p>21 MS. REDDY: Yes.</p> <p>22 MR. LEVINE: Okay.</p>

<p style="text-align: right;">Page 178</p> <p>1 You can answer.</p> <p>2 THE WITNESS: Please restate the question.</p> <p>3 BY MR. CHIN:</p> <p>4 Q Sure. Is it possible that the leasing of</p> <p>5 additional space for your program is permissible</p> <p>6 under the business plan?</p> <p>7 A The business plan has no bearing upon us</p> <p>8 leasing additional space.</p> <p>9 Q Okay. So there's a certain amount of</p> <p>10 discretion, beyond what's on the paper and the</p> <p>11 details of the business plan, which allow you to deal</p> <p>12 with the issue of space, for example? If you need</p> <p>13 more resources, if you need more space, is that not</p> <p>14 something you can make some decisions about --</p> <p>15 MS. REDDY: Object to the form --</p> <p>16 (Simultaneous conversation.)</p> <p>17 BY MR. CHIN:</p> <p>18 Q -- to make some requests for, to request</p> <p>19 more space?</p> <p>20 MS. REDDY: Objection as to form.</p> <p>21 THE WITNESS: I'm sorry, I --</p> <p>22 BY MR. CHIN:</p>	<p style="text-align: right;">Page 180</p> <p>1 MR. CHIN: Let's just do --</p> <p>2 MS. REDDY: He can answer.</p> <p>3 BY MR. CHIN:</p> <p>4 Q Just answer it, if you understand my</p> <p>5 question.</p> <p>6 A Pursuant to the FBI Exhibit 6, the charts</p> <p>7 which were associated with an e-mail from Jim Jaye on</p> <p>8 May 5th, 2008, that's an example of how we track on a</p> <p>9 routine daily basis of where we are as far as meeting</p> <p>10 the milestones. If the curve starts to flatten out,</p> <p>11 so to speak, in other words, it exceeds where we</p> <p>12 think we need to be, then we look at perhaps the</p> <p>13 reasons for that, whatever those reasons may be. The</p> <p>14 business plan was developed utilizing a model we</p> <p>15 procured which would, based upon incoming amount of</p> <p>16 name checks, based upon processing rates, historical</p> <p>17 contractor processing rates over a given period of</p> <p>18 time to figure out what our capabilities were. And</p> <p>19 those were the bases for the milestones. We look at</p> <p>20 that on a daily basis to see if we're on course or if</p> <p>21 we need to take some actions.</p> <p>22 Q What if we wanted to increase the</p>
<p style="text-align: right;">Page 179</p> <p>1 Q Me too. The end of the day.</p> <p>2 I was simply trying to figure out whether</p> <p>3 you could -- if you had to get more space, whether</p> <p>4 that is a possible thing to do within your authority</p> <p>5 to ask for that space?</p> <p>6 A I could always ask for additional space.</p> <p>7 Whether or not -- I could always ask for additional</p> <p>8 space.</p> <p>9 Q If you decided that the operational</p> <p>10 adjustment to the plan necessitated such an</p> <p>11 additional resource, would you make that type of a</p> <p>12 proposal or request?</p> <p>13 A If I decided that that type of course of</p> <p>14 action was needed in order to meet the milestones,</p> <p>15 then I would pursue that course of action.</p> <p>16 Q Speaking about the milestones, at what</p> <p>17 point, in your mind, if you are not reaching a given</p> <p>18 milestone, would you feel that that would justify</p> <p>19 such a request for more space and more contractors?</p> <p>20 MS. REDDY: Objection.</p> <p>21 MR. CHIN: Because?</p> <p>22 MS. REDDY: To form and --</p>	<p style="text-align: right;">Page 181</p> <p>1 processing rate, what would you imagine you could do?</p> <p>2 MS. REDDY: Objection.</p> <p>3 BY MR. CHIN:</p> <p>4 Q Do you understand my question?</p> <p>5 A I understand your question, yes.</p> <p>6 Q Do you have an answer or do you want me to</p> <p>7 rephrase it?</p> <p>8 A No. I'm okay with it. The purpose of the</p> <p>9 business plan, as it says in the first part, was to</p> <p>10 establish where we were, where we want to be, and how</p> <p>11 to get there. And it was developed based upon the</p> <p>12 number of resources we had, the number of resources</p> <p>13 we figured we could obtain with the additional</p> <p>14 funding from USCIS, and the number of resources we</p> <p>15 had on board and the number of resources we could</p> <p>16 finance within the FBI to establish milestones that,</p> <p>17 again, were aggressive but achievable and reachable</p> <p>18 and everyone would agree to those milestones.</p> <p>19 And the reason we have it signed by both</p> <p>20 agencies is because this is what we have in place,</p> <p>21 this is how we're going forward, which would</p> <p>22 alleviate folks coming to us saying, well, what if</p>

Page 182

1 you had this, could you do this, what about another  
 2 five million more, could you do this. That way we're  
 3 allowed to focus operationally up on processing name  
 4 checks. We're always looking for ways to increase  
 5 the ability to process or to increase the processing  
 6 rate of name checks. We're working in parallel with  
 7 improving our IT systems. We're working to scan our  
 8 records to create an electronic system of records,  
 9 you know. We're test bedding a software that will  
 10 hopefully automate a lot of the manual stuff that my  
 11 folks do. Those, in and of themselves, will over a  
 12 period of time increase processing rates.

13 The caliber of people that we're hiring  
 14 are very, very good, and some of those have really  
 15 impressed us with their ability to catch on and are  
 16 processing at a much higher rate than we originally  
 17 thought. So those are the things that we do and look  
 18 at to increase our ability to meet the milestones,  
 19 one of which is the processing rate.

20 Q Let me ask you, has the agency hired a  
 21 professional software engineer -- or I think it was  
 22 recommended that the National Name Checks Program

Page 183

1 procure either a consultant or someone at a level  
 2 which had -- of understanding in terms of mastery  
 3 over software and technological issues for your  
 4 program --

5 A When you say "recommended," can you  
 6 elaborate who recommended it and when it was  
 7 recommended?

8 Q I think it's been recommended over the  
 9 course of the years in different audits, but I  
 10 believe the most recent -- I'm referencing something  
 11 I think I read in the Office of Inspector General's  
 12 report, which -- or rather -- yes, I think I read it.

13 But the ultimate question is, have you  
 14 procured such a professional to help lead the program  
 15 on the automation needs?

16 A The FBI or the National Name Check Program  
 17 has procured an IT specialist that is on board now  
 18 with us under contract, which has examined our system  
 19 as working closely with our information technology  
 20 operations division on -- and our information  
 21 technology branch on improving our system. She came  
 22 in, examined our system. She has a really good

Page 184

1 understanding of what our system does, what our needs  
 2 are, and where we're going, and she is assisting in  
 3 that manner. And we've also had additional  
 4 assistance for our Information Technology Branch  
 5 within the Bureau to focus on IT.

6 Q Has this individual provided any  
 7 assessment or reports to your office?

8 A She works for my Assistant Section Chief,  
 9 Jim Jaye, and she has provided, over the course of  
 10 being there, information on what she has found and  
 11 has worked with our IT development folks as far  
 12 as -- as recommendations. I have not physically seen  
 13 a particular report that she --

14 Q But are you aware of such a report or  
 15 reports that are being delivered to your agency?

16 A She is working on examining the process.  
 17 I am not aware of a particular formal report that she  
 18 has produced.

19 Q Thank you.

20 MR. CHIN: Can we go off the record for  
 21 just one moment, please.

22 (Off the record.)

Page 185

1 (FBI Exhibit 10 was marked for  
 2 identification and attached to the deposition  
 3 transcript.)

4 BY MR. CHIN:

5 Q We've marked into evidence Plaintiffs'  
 6 Exhibit 10, which is a memorandum dated  
 7 January 24th, 2008 from your boss, William Hooton, to  
 8 Jonathan Scharfen, who was at that point the deputy  
 9 director of USCIS. Subject: Update on National Name  
 10 Check Program.

11 A Yes, sir.

12 Q I want to direct your attention,  
 13 Mr. Cannon, to Bates stamp FBI1107, which is the  
 14 third page. And paragraph, in particular, that I  
 15 wanted you to review is the third bulleted item.

16 A Yes, sir.

17 Q I want -- I had earlier quoted from the  
 18 second sentence which says, "FBI information  
 19 technology personnel are currently running reports to  
 20 examine the effect of eliminating FBI file reference  
 21 checks with the exception of national security checks  
 22 during the name check process. The results of the

<p style="text-align: right;">Page 186</p> <p>1 reports will be provided to USCIS management in order 2 to assist in a joint risk analysis regarding this 3 approach." 4 A Yes, sir. 5 Q So you are familiar with these reports 6 that are being run? 7 A Yes, sir, I am. 8 MR. LEVINE: Has this been marked as an 9 exhibit? 10 THE WITNESS: Yes, sir. Exhibit 10. 11 BY MR. CHIN: 12 Q What can you tell me about those reports 13 in efforts to consider the possibility of eliminating 14 file reference checks? 15 A What we do before making any adjustments 16 to the filters is run a check or have ITOD run to see 17 what effect it would have as far as eliminating this 18 field of file classifications or whatever -- whatever 19 field we determine it to be. What that does is it 20 will give you the results of things that are 21 currently in the system, how many will drop out, and 22 that helps form the basis of a risk analysis. If the</p>	<p style="text-align: right;">Page 188</p> <p>1 of getting rid of reference file checks, except for 2 the one key check it seems, going forward? Is that 3 what I understand this to say? 4 A That is one of the options that was being 5 looked at, yes. 6 Q Did you participate in those discussions 7 about this option? 8 A As far as -- 9 Q Getting rid of the whole reference check 10 search? 11 A You have stated that this is a result of 12 getting rid of all reference checks. 13 Q For USCIS. 14 A That's not what this says. 15 Q I'm sorry. This is a memo from your boss 16 to USCIS. If you want to correct me, that's fine. I 17 wasn't sure if this was in reference to addressing a 18 concern that was raised by USCIS or not. 19 Are you telling me then this is, across 20 the board, all customers? 21 A No, sir. No, sir. The effect of 22 eliminating FBI file reference checks, with the</p>
<p style="text-align: right;">Page 187</p> <p>1 effect would be to drop out 200 files -- if the 2 effect would be to where 200 name checks will drop 3 off after implementing this type of approach, then 4 that would be weighed with what would be the 5 possibility of the risk associated with that. If the 6 effect would be to drop off a larger number, then our 7 risk analysis would have to be done by USCIS. 8 Q So this is part of the risk-based approach 9 that we were -- I was asking about earlier? 10 A Yes, sir, which is all part of the 11 filtering process, as I mentioned earlier. We're 12 continuing to review and update the filtering 13 process. 14 Q And am I understanding that the filtering 15 process is essentially an electronic process -- or 16 one of the filters is? 17 A Yes. The mega filter is one that is set 18 up to run in the batch process. 19 Q And that's the first stage of the -- 20 A Yes, sir. 21 Q So am I understanding that they are here 22 contemplating the possibility or the risk assessment</p>	<p style="text-align: right;">Page 189</p> <p>1 exception of national security checks -- in other 2 words, there are a group of reference checks that 3 would still be performed for USCIS. So the result 4 would not be to eliminate all reference checks for 5 USCIS. That's what I'm saying. 6 Earlier you had indicated the study to 7 "all reference checks." No, that's not what this is. 8 Again, what this is is looking at are there ways in 9 which we can adjust the filters to more so 10 streamline -- 11 Q To narrow the search basically? 12 A Yes, sir. 13 Q Sounds to me like a great idea. Why 14 wasn't that considered much earlier? 15 MS. REDDY: Objection to form. 16 THE WITNESS: Define "much earlier." 17 BY MR. CHIN: 18 Q Okay. Maybe three years ago, two years 19 ago, five years ago. That's earlier, I think. 20 A Well, it was looked at -- considered in 21 the first part, looking at reducing the files to 22 review in the early part of 2007, which was -- the</p>



Page 190

1 result initially was a super filter. So this type of  
2 approach was being looked at at that point in time.  
3 Again, we are very cautious as far as how we approach  
4 the filtering process because what we don't want to  
5 do, obviously, is filter out things that are going to  
6 be essential for national security.

7 Q Have you completed the response? I'll ask  
8 you the next question.

9 A To the question? Yes, sir.

10 Q Okay. The exception referred to here,  
11 national security checks, do I understand that to be  
12 an electronic set of checks or is that, in fact, part  
13 of the reference files manual search process?

14 A National security checks, what that refers  
15 to is categories of files which would contain  
16 information that would affect national security.

17 Q But that would be electronically  
18 identified?

19 A I'm not sure I understand the question,  
20 sir. I'm sorry.

21 Q I'm thinking this is part of the batch  
22 process, correct, in the very first phase; is that

Page 191

1 correct?

2 A That's correct.

3 Q Where the filter this refers to is  
4 applied. And so this issue of not excluding the  
5 national security checks, does that refer to the  
6 files that are being filtered out or not filtered out  
7 electronically?

8 A Yes.

9 Q So in other words, through the batch  
10 process, there should be a way to electronically  
11 identify national security risks, correct?

12 MS. REDDY: Objection to form.

13 BY MR. CHIN:

14 Q Did you understand my question?

15 A I think I did, but please restate it. I  
16 want to make sure I give you the right answer.

17 Q Sure. The batch process, which is the  
18 beginning point, if I understand it, it's where you  
19 have the electronic files and tapes with all the  
20 various names and then that gets uploaded into your  
21 UNI database or what have you, the mainframe. When  
22 they do that --

Page 192

1 A No, sir.

2 Q No?

3 A No, sir.

4 Q Okay. Then I have misunderstood. When  
5 would this national security check occur and how --

6 A The batch process is the electronic check  
7 with the UNI database.

8 Q Okay.

9 A The index of the names.

10 Q Right.

11 A The files could be, again, under ACS,  
12 could be available Electronic Case File or in  
13 paper-based forms or things like that. But the batch  
14 process is a check of UNI.

15 Q So when does this national security check  
16 process occur?

17 A It would be right -- it would be -- as the  
18 files are identified in UNI -- as names in UNI are  
19 associated with files. In other words, a name is run  
20 in UNI on Michael Cannon, there's five hits on five  
21 files. What the filtering process does, it  
22 identifies categories of files that would be filtered

Page 193

1 out. In other words, those files would be designated  
2 as files that would be filtered out.

3 Q And by filtering out, we're talking about  
4 a mechanical automatic process?

5 A It would be an automatic process to where  
6 an analyst would get a list or look at a name check  
7 on Mike Cannon with, say, five files, five hits  
8 associated with five files, and the files that would  
9 be filtered out would be flagged as files that would  
10 be filtered out, which would mean the analyst would  
11 not be required to pursue information in those files.

12 Q In terms of -- let's just say that there's  
13 a file of poker champion winners for the last  
14 20 years -- maybe more realistic.

15 Can you give me a file that would not be a  
16 national security type file?

17 MS. REDDY: Objection.

18 MR. CHIN: Let me ask it differently.

19 BY MR. CHIN:

20 Q The national security checks, I  
21 understand, would contain certain classifications of  
22 files; is that correct?

Page 194

1 A Yes.

2 Q And then other classifications of files

3 are being weeded on a risk-based approach?

4 A Yes.

5 Q Because there's a determination that they

6 won't capture anything of worth --

7 A That is correct.

8 Q -- for the process? Did that require an

9 assessment report of some sort?

10 A I'm not sure I understand that question,

11 sir.

12 Q To make a determination as to what files

13 are not worth keeping and what files should remain in

14 the filter, so to speak, was there some study that

15 occurred -- some analysis that occurred to inform you

16 about that?

17 A With the super filter, we met with USCIS

18 routinely and went over specific files and

19 classifications to ensure CIS understood what the

20 file consisted of. In other words, a hit on this

21 file would result in this type of information. If

22 this file was filtered out, this particular file,

Page 195

1 type of classification, then this is the type of

2 information CIS would not be getting. And working

3 with CIS, could they make a determination whether or

4 not this information was needed for an adjudication

5 routinely for their name checks.

6 Q Are you aware of the Office of Inspector

7 General's report that I alluded to earlier, which

8 appears to say that you have a filter -- and maybe

9 not this particular filter, but you have some search

10 tools that result in a higher level of false

11 positives and false negatives when you're doing the

12 name matching. Are you familiar with that criticism?

13 A Yes, sir.

14 Q Do you believe it's accurate?

15 A That is the criticism regarding the

16 algorithm that is used in the name check process.

17 There has not been a specific study, as the Inspector

18 General's Office pointed out, to determine whether or

19 not -- the Bureau has not performed a study on the

20 algorithm to determine whether or not there is a high

21 level of false positives and false negatives. There

22 are --

Page 196

1 Q There appear to be academic reports

2 about -- I seem to remember some citations in that

3 Inspector General's Report about the algorithm

4 problem.

5 A Yes, sir.

6 MS. REDDY: Is that a question?

7 BY MR. CHIN:

8 Q I'm sorry. Are you familiar with those

9 reports?

10 A Yes, I am familiar with the reference to

11 those reports.

12 Q But you have not consulted the actual

13 reports?

14 A I've read the actual reports, yes.

15 Q And what do you make of those reports?

16 A The reports were an analysis of the

17 Soundex algorithm, which is the algorithm that was

18 used by the FBI in its Name Check Program.

19 Q That is also currently being used by

20 the --

21 A That's correct.

22 Q I understand that -- is it your

Page 197

1 understanding that the Soundex tool or program is

2 based on an algorithm from the 1900s? Is that your

3 understanding, the reports or --

4 A 1900 or 1999?

5 Q I'm not clear.

6 A My understanding, the Soundex technology

7 is older technology.

8 Q Is old technology?

9 A Older technology. Our Information

10 Technology Branch is looking at that in accordance

11 with the recommendations made by the Inspector

12 General. I'm not an IT expert, so I can't comment on

13 the studies in a professional manner.

14 Q If it were determined that, you know, you

15 received information that that Soundex technology has

16 got to go, it's just old and antiquated and it's just

17 contributing to the delays or the processing -- the

18 higher level of false negatives or false positives,

19 would that be something that would cause you to make

20 a request to get rid of the Soundex and get something

21 else in its place?

22 MS. REDDY: Objection to form.

<p style="text-align: right;">Page 198</p> <p>1 BY MR. CHIN:</p> <p>2 Q If you understand the question, you can</p> <p>3 answer.</p> <p>4 A I do understand the question. Our</p> <p>5 Information Technology Branch, folks in concert with</p> <p>6 the Records and Management Division, Business</p> <p>7 Operations Supporting Unit, and my name check folks</p> <p>8 are looking at algorithm and possible options to</p> <p>9 replace the algorithm. That is an ongoing process.</p> <p>10 Q As far as you know, is there any</p> <p>11 off-the-shelf, so to speak, software or tool that</p> <p>12 could be used?</p> <p>13 A As far as the algorithm, I do not know.</p> <p>14 MR. CHIN: I think that I'm nearing -- I</p> <p>15 may have one last question to ask you. Bear with me.</p> <p>16 BY MR. CHIN:</p> <p>17 Q Are there any vacancies currently on your</p> <p>18 full-time staff in the Name Check Program that handle</p> <p>19 the CIS requests?</p> <p>20 A Yes, sir.</p> <p>21 Q How many vacancies?</p> <p>22 A Approximately 20. Maybe 20 or 25.</p>	<p style="text-align: right;">Page 200</p> <p>1 A Within the last two months or so. Two or</p> <p>2 three months.</p> <p>3 Q Would that be a departure or something</p> <p>4 different from what the business plan calls for?</p> <p>5 A The business plan actually references it.</p> <p>6 Q Why would you have to receive approval two</p> <p>7 months ago for that?</p> <p>8 A Because my FSL, my funding staffing level,</p> <p>9 even though it was reimbursable, was set at a</p> <p>10 particular number, which was 124. It's now been</p> <p>11 increased to 205. So now that allows me to hire the</p> <p>12 people and bring them on board.</p> <p>13 Q And these are for the overall processing</p> <p>14 of name checks, not just limited to those processing</p> <p>15 CIS --</p> <p>16 A That is correct. The 205 is my entire</p> <p>17 section of FSL.</p> <p>18 Q I think my last question to you, sir,</p> <p>19 is -- take a look at the business plan once again, if</p> <p>20 you can. I want you to take a look at the</p> <p>21 second -- the signatory page, I believe it's on</p> <p>22 page 2. I believe it's in the first full paragraph,</p>
<p style="text-align: right;">Page 199</p> <p>1 Q And the total number, as far as you know,</p> <p>2 in terms of the current staffing levels at your</p> <p>3 program dealing with the USCIS checks?</p> <p>4 A 55 FBI personnel.</p> <p>5 Q Full-time?</p> <p>6 A Full-time personnel, approximately 273 or</p> <p>7 275 contractors approximate -- again, contractors can</p> <p>8 come and go on a daily basis, and USCIS will end up</p> <p>9 with 290 total.</p> <p>10 Q And these are all working on the USCIS</p> <p>11 name checks?</p> <p>12 A Yes, sir, that is correct.</p> <p>13 Q And I take it -- would there be a shortage</p> <p>14 of analysts then that are handling the USCIS desk or</p> <p>15 the files?</p> <p>16 A A shortage in that we -- I, my section,</p> <p>17 recently got approval to increase our staffing</p> <p>18 levels. So I'm now able to hire more people. So</p> <p>19 when I was able to increase my staffing levels, I had</p> <p>20 some vacancies I could now fill within the USCIS</p> <p>21 desk.</p> <p>22 Q And when was that approval given?</p>	<p style="text-align: right;">Page 201</p> <p>1 and it says, "Because the steps required to meet</p> <p>2 these goals require commitment from both the FBI and</p> <p>3 USCIS, the FBI's Records Management Division National</p> <p>4 Name Check Program is seeking executive management</p> <p>5 concurrence with the plan from the FBI and the</p> <p>6 USCIS." Do you see that?</p> <p>7 A Yes, sir, I do.</p> <p>8 Q What does that mean, getting or needing</p> <p>9 concurrence from the executive management of both</p> <p>10 agencies?</p> <p>11 A Give me one second, please.</p> <p>12 Q Sure.</p> <p>13 A What that means is, as laid out in the</p> <p>14 business plan, to meet our goals, certain things had</p> <p>15 to happen. One was the additional 15 million dollars</p> <p>16 coming in from USCIS. We had to get a commitment</p> <p>17 from them that the money was going to be transferred</p> <p>18 to us so it could use it as laid out in the business</p> <p>19 plan.</p> <p>20 (Simultaneous conversation.)</p> <p>21 BY MR. CHIN:</p> <p>22 Q That was the spending plan, right?</p>

Page 202

1 A We had to get a commitment from CIS  
 2 signing this that the money was going to be coming  
 3 our way. We also had to get approval at the higher  
 4 level that these milestones are sufficient. In other  
 5 words, yes, FBI, we agree, we're alongside of you,  
 6 but these are good milestone. They're aggressive,  
 7 they're reachable. We agree from the top down as  
 8 your customer that this is the route we want to go.  
 9 With the Bureau, we had to make sure that  
 10 Associate Deputy Director Tim Murphy signed it, which  
 11 would mean if I have any problems, funding in my  
 12 staff, as far as the increase in reimbursables, if  
 13 folks get hung up in the background process of the  
 14 Bureau, we can go to him and he can say, okay, this  
 15 portion of the Bureau, you guys need to do what you  
 16 need to do to address the name check section so they  
 17 can get these people on board so they can get to  
 18 where they are a steady state.  
 19 Our finance folks within the Bureau are  
 20 involved in handling the transfer of money from the  
 21 FBI -- I mean, from the USCIS to the FBI. They  
 22 needed to make sure that once the money was

Page 203

1 transferred, it was expeditiously put into our  
 2 accounts where we could spend it. We have  
 3 contractors that work for us. My section doesn't  
 4 handle contract law or contracts per se, that's  
 5 handled by the contract portion of our finance  
 6 division. They have to be on board that, yes, this  
 7 is a priority. We understand these contractors are  
 8 out here. We will push the contracting companies to  
 9 produce contractors in accordance with your plan.  
 10 Point is, there are a lot of things that  
 11 have to come to fruition outside the Name Check  
 12 Program section and the Records Management Division  
 13 for this to work. So essentially, it was making sure  
 14 everyone was on board. And by the signatures of the  
 15 folks at this level, it ensures that they understand  
 16 what our needs are and that they're willing to say,  
 17 yes, we're with you and we'll go forth.  
 18 Q So prior to this being executed, would it  
 19 be fair to say that there was not that concurrence  
 20 that was the kind of commitment that was needed in  
 21 order for your program to succeed and to reach its  
 22 performance goals?

Page 204

1 A No. I don't think that that would be a  
 2 fair statement because the Bureau has been supportive  
 3 of what we've needed in the past.  
 4 Q I do understand that you testified in your  
 5 prior deposition that you had made one or two  
 6 requests for hiring new staff, but that was turned  
 7 down?  
 8 A Yes, sir, that is correct.  
 9 Q In two successive years. So knowing what  
 10 you experienced in those two years, would this -- I  
 11 mean, would you say that there was a lack of -- I  
 12 guess the question is lack of focus or coordination?  
 13 A No. I can't say that, based upon the  
 14 facts you just stated. We submit our requests, as  
 15 does all the other components of the Bureau, and the  
 16 Bureau has a balancing test across the board to make  
 17 decisions that it deems in the Bureau's interests  
 18 overall. I wouldn't say that, no, sir.  
 19 MR. CHIN: I think I have no other  
 20 questions.  
 21 Do you have any?  
 22 MR. LEVINE: No.

Page 205

1 MR. CHIN: I want to thank you all for  
 2 coming today and, Mr. Cannon, for taking your  
 3 valuable time from the important work that you are  
 4 doing at the Bureau.  
 5 THE WITNESS: Thank you, sir.  
 6 MR. CHIN: And I appreciate very much the  
 7 forthright responses you have given to me.  
 8 Ms. Reddy, I reserve, of course, the  
 9 opportunity to maybe ask that someone from the  
 10 Bureau, if it's necessary, to return for a second  
 11 deposition. Maybe it wouldn't be Mr. Cannon, but I  
 12 know that there are a lot of documents that were just  
 13 recently supplied by your office just yesterday. So  
 14 I think that was an understanding that we had  
 15 negotiated by letter that there may be a possibility  
 16 that some of the 30(b)(6) topics might need be to  
 17 answered. But at this point, I'm not sure that's the  
 18 case. I just wanted to apprise you of that  
 19 reservation.  
 20 MS. REDDY: And you knew that we would  
 21 object to that. We had informed you of an  
 22 alternative date in order to give you the opportunity

<p style="text-align: right;">Page 206</p> <p>1 to review those documents prior to the deposition,  2 and you understood that and insisted on the  3 deposition today. If the need arises, we can address  4 that more fully later.</p> <p>5 MR. CHIN: Okay. Thank you very much.  6 MS. REDDY: Can we take a short break  7 before we --</p> <p>8 MR. CHIN: Conclude?  9 MS. REDDY: Yes.</p> <p>10 MR. CHIN: Okay. Let's go off the record.  11 (Off the record.)</p> <p>12 MS. REDDY: We have no questions.  13 (Off the record.)</p> <p>14 MR. CHIN: We're simply finishing up,  15 indicating for the record which exhibits are subject  16 to protective order and, therefore, must be treated  17 under seal. Exhibit 10 -- I'm sorry it's not going  18 in order here, Exhibit 10, Exhibit 6 --</p> <p>19 MS. REDDY: Can you just identify those as  20 you read them just for myself?</p> <p>21 MR. CHIN: Sure. Exhibit 10 is the  22 January memo FBI1105, et cetera, through 1108. FBI</p>	<p style="text-align: right;">Page 208</p> <p>1 ACKNOWLEDGEMENT OF DEPONENT  2 I, MICHAEL CANNON, do hereby acknowledge that  3 I have read and examined the foregoing testimony, and  4 the same is a true, correct, and complete  5 transcription of the testimony given by me and any  6 corrections appear on the attached Errata sheet  7 signed by me.</p> <p>8  9  10  11 _____  12 (DATE) (SIGNATURE)  13  14  15  16  17  18  19  20  21  22</p>
<p style="text-align: right;">Page 207</p> <p>1 Exhibit 6 starts at FBI CannonE1220 through 221. FBI  2 Exhibit 2, which is FBI Cannon E1232. It's the  3 February 27th, 2008 e-mail from Michael Cannon to  4 unknown. And we have FBI Exhibit 5, which is FBI  5 Cannon E1141, which is also an e-mail from Cannon  6 dated April 1st, 2008 to Timothy Murphy.</p> <p>7 That's all I have.  8 (Signature having not been waived, the  9 deposition of MICHAEL CANNON concluded at  10 4:34 p.m.)</p> <p>11  12  13  14  15  16  17  18  19  20  21  22</p>	<p style="text-align: right;">Page 209</p> <p>1 CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC  2 I, Sarah M. Bickel, commissioned as Sarah  3 Marie Harple, the officer before whom the foregoing  4 proceedings were taken, do hereby certify that the  5 foregoing transcript is a true and correct record of  6 the proceedings; that said proceedings were taken by  7 me stenographically and thereafter reduced to  8 typewriting under my supervision; and that I am  9 neither counsel for, related to, nor employed by any  10 of the parties to this case and have no interest,  11 financial or otherwise, in its outcome.</p> <p>12 IN WITNESS WHEREOF, I have hereunto set my  13 hand and affixed my notarial seal this 27th day of  14 June, 2008.</p> <p>15  16 My commission expires:  17 August 31, 2009</p> <p>18  19  20 _____  21 NOTARY PUBLIC IN AND FOR THE  22 DISTRICT OF COLUMBIA</p>



Page 210

## 1 ERRATA SHEET

2 IN RE: Milanes, et al. V. Chertoff, et al.

3 RETURN BY: \_\_\_\_\_

4 PAGE LINE CORRECTION AND REASON

5 \_\_\_\_\_

6 \_\_\_\_\_

7 \_\_\_\_\_

8 \_\_\_\_\_

9 \_\_\_\_\_

10 \_\_\_\_\_

11 \_\_\_\_\_

12 \_\_\_\_\_

13 \_\_\_\_\_

14 \_\_\_\_\_

15 \_\_\_\_\_

16 \_\_\_\_\_

17 \_\_\_\_\_

18 \_\_\_\_\_

19 \_\_\_\_\_

20 \_\_\_\_\_

21 \_\_\_\_\_

22 (DATE) (SIGNATURE)

Page 211

## 1 ERRATA SHEET CONTINUED

2 IN RE: Milanes, et al. V. Chertoff, et al.

3 RETURN BY: \_\_\_\_\_

4 PAGE LINE CORRECTION AND REASON

5 \_\_\_\_\_

6 \_\_\_\_\_

7 \_\_\_\_\_

8 \_\_\_\_\_

9 \_\_\_\_\_

10 \_\_\_\_\_

11 \_\_\_\_\_

12 \_\_\_\_\_

13 \_\_\_\_\_

14 \_\_\_\_\_

15 \_\_\_\_\_

16 \_\_\_\_\_

17 \_\_\_\_\_

18 \_\_\_\_\_

19 \_\_\_\_\_

20 \_\_\_\_\_

21 \_\_\_\_\_

22 (DATE) (SIGNATURE)

# **EXHIBIT C**

1 provides that provided no other derogatory  
2 information exists from any other name check or  
3 biometric check source and provided that the case is  
4 otherwise approvable, the case may be taken to  
5 adjudicated conclusion and approved subject to  
6 rescission or revocation at a later date if adverse  
7 information is subsequently discovered through the  
8 name check process.

9 MR. YALEN: I'm going to object -- or ask  
10 you to stop at this point.

11 THE WITNESS: Yeah.

12 MR. YALEN: The question of the 2008 change  
13 to the LPR policy is topic No. 9, not topic No. 10,  
14 and that has been or should have been addressed with  
15 Mr. Aytes. So that's outside the scope of  
16 discussion today.

17 BY MR. PARKIN:

18 Q Okay. Mr. Smith, you mentioned the May  
19 2008 target milestone that's mentioned in the news  
20 release.

21 A Mm-hmm.

22 Q Has that milestone been met?

1 A It has been substantially met.

2 Q And what do you mean by substantially?

3 A There are a handful of outlier cases that  
4 reflected as closed in one system and not closed in  
5 another system, and those are in the process of  
6 being reconciled presently.

7 Q And by a handful, could you just give an  
8 approximation?

9 A Oh, we're -- we're talking 40, 50 cases  
10 total, and that includes a wide variety of different  
11 types of cases.

12 MR. YALEN: Meaning naturalization plus  
13 other?

14 MR. PARKIN: Plus other. Plus other.

15 BY MR. PARKIN:

16 Q Thanks.

17 A Plus waiver cases and in some -- I'll give  
18 you an example. In -- in one -- two cases one is  
19 reflected as closed back in 2004 in FBI records and  
20 it was not reflected as closed in -- in 2004 or  
21 subsequently in USCIS systems, and so we're going --  
22 we've just completed the first step of a

1 to beat some target dates. In which case, we would  
2 shift the time line to make the end state goal more  
3 readily achieved or earlier achieved.

4 Q And do you know whether FBI is on pace to  
5 meet the June 2009 goal as of today?

6 A They are.

7 Q How do you know?

8 A I track their numbers on a biweekly basis  
9 and get a complete report of where they are. I also  
10 track the numbers that are retained within the USCIS  
11 system of records, which is FBI QUERY, and I look at  
12 what the two number sets are for the same time  
13 periods, and on the basis of that I can calculate  
14 whether or not we're on target.

15 MR. YALEN: So we're clear on terms, the  
16 plaintiffs are familiar with the FBI QUERY is linked  
17 to the data contained in CLAIMS 4 or accessed  
18 through CLAIMS 4; is that right?

19 THE WITNESS: For citizenship, yes.

20 BY MR. PARKIN:

21 Q Okay, thank you.

22 MR. YALEN: That's all capitals,



121

1 decisions, that will obviously involve FBI data and  
2 agreement in access to that data by the contractor  
3 so, yes, to that extent.

4 Q And has CIS conducted a study of the  
5 utility of the name check since 2002?

6 MR. YALEN: Objection, vague.

7 THE WITNESS: CIS has been repeatedly  
8 undertaking snapshot assessments of where we're  
9 getting lead information, derogatory information on  
10 applicants, and the FBI name check is one of the  
11 fundamental sources. It's a source that isn't  
12 repeated in other places between 40 and 80 percent  
13 of the time depending on the snapshot taken over  
14 the -- over the five or six snapshots that have been  
15 taken. It's a unique source of information.

16 BY MR. PARKIN:

17 Q Do you know if those snapshots have been  
18 produced in this litigation?

19 MR. YALEN: We've produced to you those  
20 that we're aware of. I believe by snapshots,  
21 Mr. Smith may be referring to some of the things  
22 we've looked at this morning, some of the materials

# **EXHIBIT D**

P. Khatri

A. Yes, in July, late July of 2003.

Q. And you left that employment in February?

A. February 29th was my last day. I guess, from a record standpoint, I think March 1st was technically the last day, which was a Saturday, which was the end of the --

Q. Pay period?

A. -- pay period.

Q. In 2008?

A. Yes.

Q. Other than your time as CIS Ombudsman, have you ever worked for the government, the federal government?

A. No. Other than in a -- I guess I had at one point a civil -- what do you call it? There was an advisory board on immigration-related employment practices. I believe that was state, though. But it was connected to the federal thing when it first came up. I was on an advisory board. I can't recall exactly what the name was.

Q. When was that approximately?

A. It was sometime in the late '80s, I believe. But that was just -- it wasn't a formal. It was more of being on an advisory board. I attended a



**Tankoos Reporting**

516.741.5235 212.349.9692 888.242.DEPO(3376)

Toll Free Fax: 800.337.6769

www.tankoos.com

142 Willis Avenue  
Mineola, NY 11501

305 Madison Avenue  
New York, NY 10165